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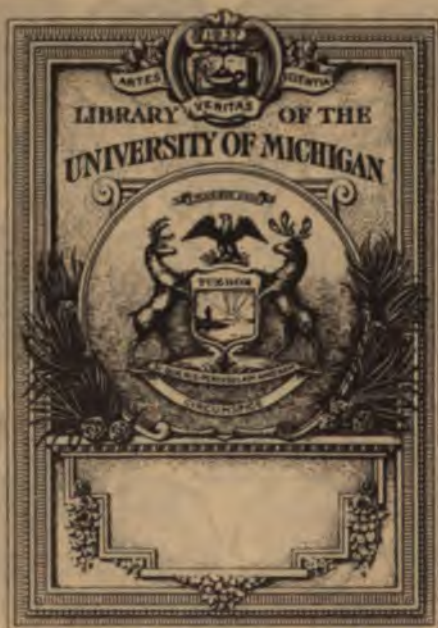
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THE GIFT OF
Prof. J. S. Reeves



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A
COMPENDIOUS VIEW
OF THE
CIVIL LAW,
AND OF
THE LAW OF THE ADMIRALTY,
BEING THE SUBSTANCE OF
A COURSE OF LECTURES
READ IN THE
UNIVERSITY OF DUBLIN,

BY
ARTHUR BROWNE, LL. D. S.F.T.C.D.
PROFESSOR OF CIVIL LAW IN THAT UNIVERSITY, AND
REPRESENTATIVE IN THREE PARLIAMENTS FOR THE SAME.

THE SECOND EDITION, WITH GREAT ADDITIONS.

VOL. I.
CONTAINING A VIEW OF THE CIVIL LAW.

LONDON:
PRINTED FOR J. BUTTERWORTH, FLEET-STREET,
AND JOHN COOKE, DUBLIN;
By G. Woodfall, No. 22, Paternoster-row.

1802.

TO THE
PROVOST
FELLOWS AND SCHOLARS,
OF THE
COLLEGE
OF THE
HOLY AND UNDIVIDED TRINITY,
NEAR DUBLIN.

THIS WORK IS
MOST HUMBLY DEDICATED,
BY THEIR OBLIGED AND
DEVOTED SERVANT,

ARTHUR BROWNE.

1

Prof. J. S. Reeves
2-11-1930
2 vols.

PRÉFACE.

MY principal object in publishing the following work, has certainly been to prove industry, and to shew that I do not wish to hold any office as a sinecure. I cannot however but think, that it may be useful to the younger members of the bar, who may wish to gain some general knowledge of the civil law.

It is surprising how few gentlemen of the legal profession, (excepting those, and they are not numerous, who have studied in Scot-

land), are acquainted with this science, notwithstanding the encomiums bestowed on it by Lord Hardwicke and Lord Mansfield, and the constant references to it in books of reports. I have always ascribed this defect not to want of diligence, but to the nature and quality of the treatises on the subject, for in quantity and number they are abundant.

Domat is calculated for the meridian of France. Ayliffe's work, though learned, is dull and tedious, and stuffed with superfluous matter, delivered in a most confused manner; the beautiful sketch of Mr. Gibbon is too short, and, like all his writings, presupposes rather than conveys knowledge: Woods's Institute, though an excellent work for the student, pursues a method not familiar to the English lawyer. Taylor's Elements, though highly respectable, are filled with heterogeneous matter, amidst which the civil law seems to be considered but collaterally, info-

much that he has acquired from Gibbon the character of a learned, spirited, but *rambling* writer. Lastly, Heieneccius, an author powerful in erudition, by a German dress and sectional form, disgusts the English eye.

It occurred to me, therefore, that a short work, in the method and order adopted by Mr. Justice Blackstone, in his Commentaries on the Laws of England, as nearly as the spirit of the two laws would possibly allow, might, by the familiarity of its order, entice the student of the common law to take at least a cursory and general view of this more ancient code, when the conciseness of the sketch could not possibly encroach on his time. If the text be still uninteresting to him, perhaps some of the notes, as far as they relate to the statute law, or contain any new matter, may engage his attention. I have called it the *substance* of lectures, because the reader must naturally

suppose, they were longer when delivered, much having been omitted which was adapted only to academical research, and classical enquiry. I am aware that an objection may be started (the very converse of those above mentioned to the prolixity of civilians) viz. to the brevity of the work. From those deeply versed in the civil law, the objection is fair, nor is it supposed that it can be of use to them, except as an abridgment, *in adjumentum memoriæ*. But it would come with a bad grace from the idle theorist who has not industry, or the busy practitioner of common law, who has not time to peruse works of greater length, and for such it was principally intended, that he who runs may read*. Prolixity would have given little trouble, con-

* If deeper research be desired, the parts of the *Corpus Juris Civilis* to be read on each subject, are mentioned in the respective Chapters, so that while conspicuous remarkable portions are selected and abridged, a general course of Civil Law is pointed out.

PREFACE.

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cisenefs gave much. Quotation, and indiscriminate transfusion, would have swelled the work, with moderate pains; but compression and selection of points really important, were attended with considerable labour.

In short, my hope has been that the student at the inns of court, after perusing the inimitable commentaries on, the law of our own countries, might be tempted to look into an epitome of the civil, not presuming to any the smallest emulation in merit, but whose comparative extent is proportionate to the comparative importance of the two laws to him.

The English forum sometimes treats the study of the civil law with levity, but may its disciples be permitted to say, that it never was despised but by those who were ignorant of it. The very numerous cases in our books

of reports, referred to in the following pages, in which the utility of this knowledge was eminently conspicuous, are so many irrefragable proofs of its advantage to the common lawyer.

In this second edition the author has greatly compressed that part which treated of the ecclesiastical law of Ireland (which he is now publishing separately in that country) and has supplied its place by enlarging on the law of the admiralty, and shewing its connection with the civil law.

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ERRATA & OMISSA.

VOL. I.

- P**AGE 10, line third of the note, for *discretion* read *direction*.
P. 17, line 19, before *instituted* insert *the*.
P. 25, line 15, after *civil* read *law*.
P. 32, line 21, after *imperial* read *law*.
P. 41, line 7, last word, dele *an*.
P. 54, line 15, the *semicolan* should be after the word *mine*.
P. 55, line 12, dele *absolutely*.
P. 74, *note*, first line, for *say* read *says*.
P. 78, first line, for *to the parties* read *on the parties*.
P. 80, note, third line, for *that consent* read *the want of that consent*.
P. 88, note; sixth line from the bottom, for *direction* read *discretion*.
P. 114, line 8, for *will* read *by will*.
P. 117, line 1, for *as also* read *nor*.
P. 121, last line but two, after the word *line* dele the comma.
P. 123, last line, dele *their*.
P. 127, note, line 10, for *excused* read *excuse*.
P. 128, note, for *de si* read *ac si*.
P. 170, note, last line but one, transpose the comma before *babes*.
P. 180, line 3, for *by* read *to be*.
P. 182, line 19, after *actus* dele the *semicolan*; after *via* put a comma.
P. 184, first line, for *there* read *three*.
P. 187, note, line 2, after *some* dele the comma.
P. 189, line 5, after the word *acquired*, for *and* read *an*.
P. 200, note, for *third book* read *last chapter of this book*.
P. 210, last line but three, for *where first* read *where the first is*.
P. 213, line 16, for *warrantry* read *warranty*.
P. 214, last line but two, after *objed* dele the comma.
P. 232, note, fifth line from the bottom, for *administration* read *administrators*.

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ERRATA & OMISSA.

VOL. I.

PAGE 10, line third of the note, for *direction* read *direction*.

P. 17, line 29, before *infinitive* insert *the*.

P. 25, line 15, after *civil* read *law*.

P. 32, line 21, after *imperial* read *law*.

P. 41, line 7, last word, dele *an*.

P. 54, line 15, the *feminine* should be after the word *mine*.

P. 55, line 22, dele *absolutely*.

P. 74, note, first line, for *say* read *say*.

P. 78, first line, for *to the parties sent on the parties*.

P. 80, note, third line, for *that subject* read *the subject of that subject*.

P. 82, note, first line from the bottom, for *direction* read *direction*.

P. 114, line 2, for *will* read *by will*.

P. 117, line 2, for *as* *affs* read *as*.

P. 121, last line but two, after the word *law* dele *the* *common*.

P. 122, last line, dele *their*.

P. 127, note, line 10, for *excepted* read *except*.

P. 128, note, for *de f* read *as f*.

P. 170, note, last line but one, transpose the *names* before *being*.

P. 180, line 3, for *by* read *to be*.

P. 182, line 19, after *after* dele the *feminine*; after *via* put a *comma*.

P. 184, first line, for *there* read *three*.

P. 187, note, line 2, after *some* dele the *comma*.

P. 189, line 5, after the word *acquired*, for *and* read *an*.

P. 200, note, for *third book* read *last chapter of this book*.

P. 210, last line but three, for *where first* read *where the first*.

P. 215, line 16, for *warranty* read *warranty*.

P. 214, last line but two, after *object* dele the *comma*.

P. 232, note, fifth line from the bottom, for *administration* read *administration*.

ERRATA & OMISSA.

Page 236, note the third, for *postliminio* read *postliminii*.

P. 257, note the 21st, after *brevis* dele the *period*.

P. 268, line 16, for *incumbrances* read *incumbrancers*.

P. 270, note, fourth line, for *kind* read *kin*.

P. 306, note, for *Casina's share* 115l. read 1,150l.

P. 313, line the third, insert *to* before *overweigh*.

In speaking of degrees in colleges, it was omitted to be observed that Dr. Christian holds, that no degree can have been given in canon law since the reign of Henry VIII. yet in the college of Dublin degrees are constantly given *in utraque jure*. It has also been controverted, whether a mandamus will lie for a degree. Though Dr. Bentley's case be not directly in point, it should seem as a corollary from that case that such a mandamus would lie.

It must be observed also, that three notes have been inserted erroneously, viz. notes 30—31—and 33, in pages 472—473—and 475, which are found also in the second volume. Though the repetition of them might be justifiable from their nature, and to save the trouble of referring from one book to another, it has, in fact, been a mistake which, with the other errata of the press, must be ascribed to the unavoidable inconveniences arising from the author and the printer residing at a great distance from each other, in different countries, and corresponding only by letter.

INTRODUCTORY CHAPTERS.⁽¹⁾

CHAPTER I.

ON THE UTILITY OF THE STUDY OF THE CIVIL LAW.

THE lustre of the Roman name, which has dazzled all succeeding ages beyond their hope of competition, was not confined to arms. It was the peculiar glory of the nation which subdued the world, to furnish mankind with a code of laws, containing the most perfect system of justice and equity between man and man, which has ever been produced by human invention. I say between man and man, to avoid the exceptions which may possibly be taken to its public regulations, as fraught with an arbitrary spirit. And when it is called the most perfect of human codes, the epithet means not to assert an entire freedom from defects, which must be incident to every human institution. But this we may affirm with safety,

(1) These were delivered as *Lectures* in the University of Dublin; which circumstance will explain some passages therein.

that as a collection of written reason; as a great body of principles, founded in natural equity (2), it has no rival. The general excellence of its rules, and justice of its decisions, have extorted, from all the nations of Europe, an acknowledgment of its pre-eminence. They have in consequence either adopted it, as their own municipal law; or, where circumstances and events forbade so general an admission, have been glad, in all cases where their own laws were silent or imperfect, to search out the dictates of natural equity, in the illustrations of this code. Hence, though the phrases civil and municipal are, in strictness of speech, synonymous, yet the law of Rome (as if the world was yet one state under its dominion) has emphatically vindicated to itself the title of the *civil* law.

That it has obtained this pre-eminence, we shall not wonder, when we reflect on the superior advantages which attended its formation. Most laws (not excepting those of England) have been immaturally born in the early times of rudeness and barbarity, and receiving their accretions from chance, or sudden emergency, appear deformed masses, composed of ill-jointed, ill-proportioned members; the laws of shreds and patches.

(2) As a pattern, therefore, it must be admired and consulted, even where it has no binding force.

With us, the most liberal constructions and interpretations of the law by judges, perpetual new acts of the legislature on the spur of the occasion, together with the creation and advancement of separate courts of equity, have been necessary to support a structure, which, barely sufficient for convenience, never can admit much beauty. Far different was the fortune of the civil law. It originated in times of the highest civilization, the offspring of philosophy (3) and science. The compilers of it, though at the head of the legal profession, were not mere lawyers, but philosophers and statesmen. Nor were they confined to the resources of their own minds. The labours and compilations of many ages and countries, beginning with the foundation of Grecian legislative wisdom, afforded them powerful auxiliaries. Under their auspices, the Institutes of Justinian appeared in all the beauty which method, arrangement, and even the ornaments of style, could add to the natural charms of truth and equity.

It should seem scarcely necessary to state more than has been premised, in order to establish the object of my present Prælection, which is to point out the utility of studying the civil law, and to shew, that the labour of its disciples will not be

(3) It is amusing to observe, how the principles of the philosophy of the Ancients, especially of the Stoic Discipline, shew themselves frequently throughout this Code.

ill bestowed. To use the language of an eminent author, did we find nothing in this law but a more thorough knowledge of the great principles of justice—a more accurate delineation of the boundaries between right and wrong—a series of excellent rules applicable to our own conduct, and to all the affairs of human life—sublime and elevated notions of philosophy and religion—it surely must be entitled to the highest place in our esteem. Will the liberal mind deny, that such an investigation must be amply repaid?

But exclusive of its abstract theoretical excellence, this study offers the most signal aids, both in the transactions of individuals, and in the intercourse of nations.

In the first place—the civil law is an excellent repository of those rules, which ought to guide the natural conduct of states, and contains in its bosom the law of nations, as well as of nature. It is evident that nations, in their transactions with each other, must have a common appeal to the law of nature and right reason. But this is originally an unwritten standard. The philosophic Roman legislator may be said to have reduced it to writing, and the world has decreed, that to his rules, as declaratory and explicative of the law which right reason has dictated to nations, the appeal shall lie. It becomes therefore a science absolutely essential to the statesman and negotiator. No where will

they find the rights of ambassadors, the laws of war, the rules of federal construction, so well or so accurately laid down (4).

Grotius, and other writers on public law, have drank deep of these springs, and acknowledged their obligations to the Roman code. It is impossible for us even to understand the technical language or mode of reasoning of foreign powers, without reference to this law. Some writers (5) have imputed that superiority in negotiation which foreigners, particularly the French (6), claim over us, to their superior knowledge of the civil law. They probably attribute too much efficacy to a favourite study, but that this comparative ignorance must have its effect can scarcely be doubted. How is that man qualified to settle and confirm a treaty, who does not know the subsequent construction which it may admit, or the rules which are to guide and govern its interpretation? How

(4) *In fide quæ sola ratio commendat, a Jure Romano ad Jus Gentium, tuta sit collectio*, says Bynkershoek, 2 J. Pub. Cap. 14.

On the civil law, says Sir William Scott, great part of the law of nations is founded.—*Judgment on the Swedish Case of Convoys*, 1799.

(5) E. G. Ayliffe,

(6) This superiority, if true, has been probably owing to the nature of their government—better formed for *secrecy* and *dispatch* than ours.

can we answer the claims and manifestos of other nations, if delivered in phrases, and resting upon principles and rules of argument with which we are unacquainted (7)? Leagues and alliances, tariffs and pacts of commerce, treaties of peace, and proclamations of war, all the disputes in Europe about the right of succession and limits of territory (8), have such a reference to this law, that, without some acquaintance at least with its outline, modern history is unintelligible.

Having discussed the advantage of this pursuit in public, we proceed to speak of its use in private affairs.

If we regard the Continent, proofs are unnecessary; a momentary view will suffice. The civil code, among most continental nations, is the common law of their land, and governs all the

(7) A remarkable instance was offered, not many years since, of the utility of this knowledge upon such occasions, by that prodigy of universal science, Lord Mansfield, the dawn of whose celebrity was not a little brightened by the answer to the Prussian manifesto, relative to the Silesian loan about 1753, in the composition of which answer he had a principal share.

(8) Add the discussion of such disputes, as whether wars have been commenced justly—proclaimed in due form?—whether, in the conduct of them, the laws of war have been observed? all which points are decided by the law of nations, whose best expositor is the civil law.

transactions of individuals with each other, whenever it is not modified and controuled by positive ordinances, or opposed by constant usage to the contrary; and from its principles light is borrowed, if the positive statute laws are ambiguous or imperfect (9). This is the case particularly in Holland, and all the United Provinces (10), where it has obtained a greater authority than in any other country, perhaps on account of the excellent laws of trade which it furnished to that commercial nation. The practitioners in their courts refer to the Roman edicts with the same familiarity with which we speak of an act of parliament (11).

In Germany, the assessors or judges of the Imperial chamber (which is the supreme court of the Empire) swear, upon entering into their office, that they will judge all causes according to the ordinances of the Empire, or in defect of them, according to the Roman civil law; and all writers

(9) So, often in England. Take this example: As to the distributions of intestates effects, where our laws are ambiguous or not sufficiently express, our courts are chiefly guided by the doctrine of one of Justinian's novels.

(10) Especially Friseland.

(11) The *Senatus Consultum Tertullianum*, or the *Lex Falcidia*, is as well known to them, as the Statute of Frauds, or Entails, is to us. See a memorable instance in *Bynkershoek*, on the question, Whether the widow may marry *intra annum luctus* in Holland?

agree, that it is the common law of the Empire (12), though it prevails less in the northern parts, especially among the Saxons, than elsewhere (13). The same, with little alteration, may be said of France. It is not always by the express letter of any law in the Roman code, when they do resort to it, that the tribunals of Holland and Germany are governed; the letter may not extend to the particular case; it is then by analogy and deduction that they derive light from its principles. Thus the *lex de pauperie* may in its letter be confined to damage done by the cattle of another, but in its equity and its reasoning, is extended to damage done by another's ship or boat. The *lex aquilia*, even if it had not mentioned shipping, would be construed in its reasons to apply to navigation; and this method must always be kept in mind by the English lawyer or judge, who

(12) The several districts and divisions of the Empire have their respective constitutions, ordinances, and provincial customs; but these are all in subordination to the civil law, are expounded by it, and when they are silent or deficient, that law is always introduced.

(13) The Imperial chamber consists of the counts and barons, who are called presidents, and their assessors. These assessors, who are in fact the judges, (the presidents in general not being acquainted with the laws) are required to be well informed in the civil and canon laws, and have usually spent a considerable time in the study of those laws in their universities.

wishes to derive use and advantage from the civil law.

If we turn to Italy, we see indeed the Venetians, who always maintained their liberties against the Roman emperors, partially adhering to their own laws, and rejecting even wisdom, when moving from a hostile region. But in the papal territories, and more especially in the city of Rome, where the canon law might expect undisputed supremacy, it frequently gives place to its celebrated rival which reigns even in the Roman rota (14). In the other European states, admitted in different degrees, it stands the interpreter of municipal law, and points the road to judicial station. Even in our neighbouring kingdom of Scotland, the form and practice of the civil law are observed in all their proceedings; and not many years since, this knowledge was universally coveted by the gentlemen of that country, even those unconnected with profession, not merely as an avenue to profit, but as a most useful exercise of the understanding. If then we have any commercial or other intercourse with foreign nations, if we would wish to understand their history, policy, or constitution, here is the proper and necessary clue to guide our steps.

Its benefits, within our own national domestic sphere, are next to be estimated in the balance.

(14) The Roman rota resembles our court of chancery.

In the courts, military, maritime, and ecclesiastical, its predominance is universally known. The first are by disuse almost fallen into oblivion; but the jurisdiction of the court of admiralty in England is of great moment and extent, and in it the knowledge of the law of nations (the great expounder of which, as has been observed, is the civil law) is most essentially necessary. In all suits to which the ecclesiastical courts are competent, the civil law has great influence. In testamentary causes it rules. Undoubtedly, in many cases, common and statute laws will interpose their power in the form of prohibition, but still the subjects over which those courts have a peculiar jurisdiction are exceedingly numerous; over this extensive field, the civil and canon laws bear united sway; the former usually (15) paramount, the current of the latter defying pursuit without a previous knowledge of its parent stream, on whose model it was formed, and from whose sources it has copiously borrowed.

(15) Indeed perfectly so in the courts military and maritime, and in testamentary causes in the ecclesiastical.

Mr. Reeves observes, that when the court of admiralty was erected, the laws of Oleron constituted a national code of maritime law for the discretion of that court, and whatever was defective therein was supplied from that great fountain of jurisprudence, the civil law, which was generally adopted to fill up the chasms that appeared in any of the municipal customs of modern Europe,

An endeavour to persuade the common lawyer to prosecute the theme of our present commendation, may be thought to admit more difficulty. It would certainly be pedantic to deny, that many lawyers may and do reach the summit of wealth and reputation without its aid. A certain technical knowledge, assisted by exterior qualities or fortunate events, may often acquire the smiles of fortune and of fame. But still, it will be true, that the man whose philosophic ambition aims at something beyond the skill of an able attorney; *Qui vult rerum cognoscere causas*; who with a scholar's mind, wishes to know the rudiments and origin of the rules laid down for his instruction, ought to be a disciple of Justinian as well as of Coke(16). How is this position (it may be asked) consistent with a truth universally known, that the foundations of the common law were laid in the feudal system? Feudal principles, indeed, supplied the foundations, but were utterly incompetent to the superstructure. They breathed only war. Strangers to commerce and the arts of peace, they regarded landed property in the hands of the vassal, only as the instrument of military strength.

(16) The great judge, who with so much glory presided at the head of the law for one and thirty years, has manifested to the world how much the mind of the common lawyer (often, in former times, too narrow and confined) may be liberalized and extended, by a previous knowledge of morals and of the prætorian law,

and the source from whence the lord derived his supplies. On contracts, covenants, obligations, those vast fields of modern controversy; in short, on all things called in the metaphysical language of some legal writers (17), *things purely rational* (18), that system was silent.* To these deficiencies the full treasures of Imperial jurisprudence offered a ready supply. It was eagerly (19) grasped, and all the learning of our early writers, Bracton, Britton, and Fleta, upon these subjects, shines in borrowed plumes. In process of time, when the rude spirit of ancient chivalry was calmed, when the shackles upon alienation were struck off, and wiser policy calling the attention of the nation to its commercial advantages and insular situation, expanded our sails over every field of the ocean, a new series of transactions arose amongst men—new subjects of controversy—new sources of litigation and difficulties, which found no resolution in feudal regulations. Hence

(17) Ayliffe—Wood, &c.

(18) *Entia rationis*; moral entities—*Vide Puffendorf's Introduction.*

(19) This law was the favourite of churchmen, who, in fact, formed great part of the lawyers of the time, and thence it is no wonder that it should insinuate itself, by insensible degrees, into the English jurisprudence.

The *maxims, rules, and reasonings* of the civil law, have often been *adopted*, or used by way of *illustration*, by our common lawyers.

much of the civil law, which had diffusively treated of these matters, was incorporated with our own, though by long use the debt is forgotten, and we are apt to consider it as part of our original stock (20). If we add to these observations one further consideration, that great part of the business of these countries is done in courts of equity, whose rules and practice, for the most part, trace their descent from the Roman forum, and that in Ireland, no distinction is made between the common and the equity lawyer, there will not appear much room for contemning in the temporal courts the knowledge of the civilian (21).

These considerations induced me to make the experiment, whether an attempt to read a course

(20) Because, after this insinuation and incorporation, the distinction does not appear—and, because it derives its binding authority from ourselves. Besides these ideas, many others have been evidently taken from the civil law, E. G. Informations *ex officio* by the Attorney General, and felons not having counsel, and witnesses for them formerly not having been sworn; but the instances are so numerous, that I must refer the reader to the following work at large, where he will find them in every page.

(21) I scarcely ever yet have met with a point not connected with the feudal law, on which, if English law books did not satisfy the doubt, I have failed to find its resolution in the civil law. Take one instance which has just occurred to me, and on which, perhaps, there is no decided case in our books—that of marksmen to a will of lands, witnesses that cannot write!

of lectures, instituting a comparison between the Roman and English laws—expounding the former, and marking the rules, principles and practice, which it has transmitted to the latter, might be acceptable to the public and the University. That forensic studies are very properly made a branch of university learning, has been ably argued by the celebrated commentator on the laws of England, and every plea which can hold for introducing into this place the study of the common, has ten-fold force when applied to the civil law; accordingly Professor Hallifax at Cambridge, and Dr. Beaver of Oxford, have lately obliged the world with a sketch of their labours in this department. But, above all, the learned professor of Glasgow, receiving the additional encouragement which must attend this study in a kingdom where it so nearly approximates to the municipal law, has acquired most deserved celebrity, and has attracted many of the youth of this country, as well as of England, within the sphere of his instruction. Without pretending to vie with such illustrious names, I shall have the satisfaction of reflecting, that I have at least endeavoured to prevent the office I hold from being a sinecure, and have set an example of labour to future (22) and more able

(22) Far be it from the writer, to insinuate any thing in the most remote degree against his predecessors—their avocations—their tenure being only biennial; their professions, which must have called their attention to studies very different from those of the law, shew sufficiently why they could not have much applied to this business.

professors, who may deprive the wandering student of every reasonable pretext for seeking this knowledge abroad; whither, in most branches of learning however, not so much necessity, as prejudice in disfavour of their own nation, added to the pursuits of pleasure and love of travel, usually lead them. Much has been done in the medical line to overcome the necessity of resorting to the schools of our indefatigable northern neighbours. Let it be a pattern to jurisprudence.

Before I conclude, permit me to make some annotations on the objections which may possibly occur to the utility of such a course of lectures, as well as to the advantages of this study in general. These may, I think, be reduced to three. The first is—That many heads of the civil law are now become mere matters of curiosity, nothing analogous to them existing in modern institutions.

Undoubtedly, that professor would act erroneously, who should employ the same time and labour in treating of obsolete doctrines, such as servitude, adoption, and legitimation, which would be required by subjects still forming considerable branches of the jurisdiction of our modern courts, for example—marriage and testaments. But, surely, the objection, that the former enquiries are useless, could no where be more unfortunately urged, than to the academic. Enquiries, which tend to illustrate Roman history and antiqui-

ties (23), and to explain numberless passages; words and phrases in classic authors, can never appear uninteresting to the scholar. The man of taste will be charmed with the dress which law (often branded as a science rude and uncouth) has here assumed. The pandects are written with a beauty and elegance of style, which has wrested this celebrated encomium from eminent critics, that the Latin tongue might be recovered by their aid, though all other authors were lost.

To deny that such works court our perusal, will sound harshly in the collegiate ear.

The greater portion of this learned body cultivates, or is designed to pursue, the studies of theology. To them, as has often been observed, this science holds forth the most interesting information. The New Testament was written, and the

(23) In such illustrations so much has been done by Heineccius and others, that I can claim little merit therein, but that of a compiler. Indeed, all lectures are compilations; but let it not thence be foolishly argued, that they are useless. The student might have recourse to the original books, and compile himself; but will he do so? It requires, probably, more time and labour than he is willing to bestow. But when the labour of another has heaped together knowledge from many detached books, then he will receive instruction. Besides, the man who does not read at stated times, scarce ever reads with effect; and that is one great use of lectures. The student is obliged to learn something *every day*.

sacred events recorded therein happened, in countries subject to the Roman yoke, and where Roman manners and customs were universally diffused; of course, the allusions to the laws and usages of that nation are frequent, and an acquaintance with them tends, in no small degree, to illustrate and explain the Scriptures. Dr. Halifax has made the same observation, and particularly and justly applied it to the writings of St. Paul.

Lastly, let it be remembered, in reply to this objection, that if we seek in other laws such knowledge as may suggest useful additions and improvements in our own, our researches must not be confined merely to the correspondent parts.

I proceed now to a second objection made to the dignity of this study, which is—that however just the encomiums which have been bestowed on the order of *institutes*, and the style of the *pandects*, yet, that the whole body of the civil law, taken together, is a confused, indigested mass, without order, beauty, or harmony.

It must be admitted, that the *Digests* or *Pandects* are only collections of fragments, extracted from the written opinions of various lawyers, and the code is a compilation from the constitutions of different Emperors. In the junction of such detached members we cannot always expect regular

series, and some of the parts may appear contradictory (24). But when we consider that the institutes, celebrated for perspicuity and method, furnish an index and clue to this apparent labyrinth—that such noble materials exist which require only the labour of arrangement, and that this labour is, in these days, almost entirely saved by the indexes and notes of numberless commentators, such cavils will vanish, or appear the language of idleness. Were they founded in truth, they would but prove more strongly the propriety and advantage of this work, and its regular arrangement.

The last and most grievous accusation against this law is, that it breathes an arbitrary spirit, repugnant to those principles which ought to be inculcated on the minds of the youth of these countries. Of this charge, I should esteem it a difficult task, indeed, to undertake the refutation; a labour which, however, Giannoni has not refused in his celebrated History of Naples (25). He insists, that this stigma originated in false

(24) It is said also, that they are often applicable only to particular cases, from whence no general principles can be drawn, and many laws which are found in one part of this collection are altered or amended in another. *The same, perhaps, may be said of any code whatsoever.*

(25) A work strongly recommended to civilians by Earl Mansfield.

constructions of ambiguous passages, made by the adulators of Frederick Barbarossa, then meditating encroachments on the liberties of the Empire. This opinion is supported by some modern writers even among ourselves. Dr. Hallifax seems strongly to countenance the opinion in a note to his preface. However, they seem to me to view the subject with a lover's eye, who, not content with a thousand excellencies in the object of his affection, wishes to assert a total exemption from defect; I must acknowledge that it appears to me, that the maxim—*Princeps legibus solutus est*—and others of a similar nature, cannot be explained away. It is true, the practice did not always coincide with this theory, because no governors can expect a permanent obedience to laws, which they totally despise and transgress themselves. And besides, as civilization advances; and manners are polished and softened, the genius and temper of a nation, by insensible degrees, puts a controul on powers unlimited by the law and constitution. Thus, in France, many powers constitutionally existed in the monarch, which, though he would not voluntarily renounce, the genius of the times forbade him to exercise; and history informs us, that many of the Roman emperors were scrupulously observant of the laws.

Thus stands this well known charge, which, true or false, has, in my humble opinion, no relation to the present undertaking. The arbitrary imperial claims could only relate to the constitution

code; and without quoting infinite authorities, am fortified in my opinion by one of the greatest Lawyers (1) of this or any age, who has pronounced it the first collection of written reason that ever existed, I am willing to admit many and various instances of pre-eminence in our domestic institutions. As to the obligations which the English Legislator has owed to Justinian, they have been treated of in the former prælection, and are not the objects of our present discussion. My immediate aim here is, to compare the diversities of the British and Latian codes. Not that it can be expected that the limits of this treatise will admit many points of comparison; to contrast them in a few striking instances, is all which the contracted space of this species of composition will admit, while, at the same time, I may be able to convey to the student some knowledge of the correspondent heads of each law.

In an Introductory Lecture, so essential to my general plan, but so purely didactic, the auditor must not demand that embellishment so often expected from this chair, nor suppose that the severity of law can catch the varied lights of poetry, assume the garb of eloquence, or vest itself in the colours of the historian. Even the celebrated commentator of England, who soars

(1) Lord Mansfield.

far above the ordinary path of didactic composition, has scarcely attained praise for more than unornamented neatness of style. My object is instruction, not decoration.

The municipal law, both of Rome and Britain, is distinguished into the civil and criminal, and the civil again into that which treats of the rights of persons—of the rights of things, and of actions or remedies for the redressing of wrongs; and in both civil and criminal, the modes of trial, and the forms and constitutions of tribunals, will naturally offer themselves to our consideration.

We begin with comparing personal rights. And here the English laws have a total and undisputed preference. The law of persons at Rome, was the black code of personal slavery. Liberty, says Montesquieu, speaking of the political œconomy of Rome, was in the centre, slavery in all the extremities. He might have added, that liberty germinated in the root of domestic œconomy, but slavery withered every rising branch. The master alone possessed the odious privilege of tyrannising over all his family. Imagination cannot aggravate the picture of oppression displayed in every private mansion of Rome, the renowned domicile of public liberty. Each roof resounded with the cries of the tortured slave, whose subjection bore no resemblance to the honest servitude of our menial domestics; whose unprotected rights boasted

not even those slender fences which surrounded our ancient villein, and retarded the rapacious violence of Gothic feudality; whose torments have only been paralleled by the horrors of that colonial system, which has disgraced humanity in later days. Like the modern African, he saw his children liable to be torn from his embrace, and hurried into the cruel arms of distant captivity; but he did not, like him, view in tantalizing contrast, security and happiness hovering over the children of his master. They were equally exposed to the arbitrary will of one common ruler, modified only by variety of temper and gradations of paternal tenderness or obduracy. Neither son nor slave could acquire property to alleviate servitude, or redeem bondage. Their acquisitions merged in the patriarchal lord, who presided with unlimited sway over their subjected interests, and determined their happiness or misery at his pleasure. Nor had the liberty or security of the marriage state attained to a much more elevated degree. In the later and politer times of Rome, indeed, the husband, by self refinement, as well as general habits, was restrained from personal brutality, and the separate property of the wife was sufficiently secured by settlements in some measure resembling ours, but the marriage chain was of the most dissoluble texture, and broken on the slightest causes. Cohabitation during the period of one year, constituted a marriage, styled *by use*, and separation for the shortest space

of time before its expiration, annulled the union. Proofs the most vague and unsolemn produced divorce. When the marriage tie was so slight and uncertain, domestic felicity was fugitive and fickle. The education of children must have been neglected, though their legitimacy on account of this lax state was more favoured than with us. Thus children born before marriage were legitimated by law, a doctrine attempted to be introduced into England by the canonists, and rejected by the barons, in that celebrated, concise, and energetic phrase, *Nolumus Leges Angliæ mutari.*

With respect to the fourth and last relation of persons, noticed by legislators, that of guardian and ward, the principles of the civil have been copiously borrowed by the English Jurists, yet still perhaps not sufficiently to satisfy the philosophic mind. In the eyes of some philosophers the loan should be augmented, since the former with provident hand guarded the property not only of the lunatic and the minor, but even of the foolish prodigal, who wasted his substance in riotous living; yet in placing women under guardianship at all ages, and in any situation, they offered an affront to the sex, and one surely irrational, superfluous and insulting; and the legal restraint of prodigality, though imitated by Germany and Holland, countries accustomed to arbitrary rule, is justly rejected by liberty ordaining freedom of

action to all endued with reason, and by commerce demanding the unshackled alienation of property. If the Romans, however, should be thought to have any superiority in regulating personal rights, to this branch it is confined.

We proceed now to the rights of things. In their division of things, both laws are equally minute and accurate, but in the partition of estates in things, the *Lucidus Ordo* of the civil code predominates. The civilians knew nothing of that puzzled distinction between real and personal property, which pervades our legal system of ownership, which causes different species of property to descend in varying lines, and to different persons—which obliges the heir, who controverts the pretended will of his ancestors, to litigate a double suit, before a temporal and also a spiritual tribunal, perhaps with opposite success, and repugnant decisions—which deprives a great part of the community, possessed of valuable leasehold interests, of that share in the constitution which is possessed by the impoverished cottager at their door—which involves the creditor in endless labyrinths, by discriminating different modes of executions adapted to the various distinctions of the debtors property liable to his demand. They knew no feudal fictions, which hamper our alienations, and load our conveyances two hundred years after their causes have ceased, while the sage trembles to touch the wen.

now become part of the constitution. Simple and uniform in their regulations, clear and pellucid in their divisions, they subjected lands and goods to the same dispositions, and transmitted them in the same conduits to posterity.

Let it be observed, that I have praised the simplicity of the disposition, without as yet extending my observations to its effects. Uniformity and utility are not necessarily connected. All property descended in the same manner, but the mode itself may not be equally laudable with its unity. All property gavelled; with us gavelling is almost considered as a punishment, and has actually been made the instrument of penal laws. Yet gavelling is the policy of republics; it hurts the pride of families, it prevents the growth of estates, it forbids the towering castle to rise, and the immense demesne to spread, and swell the arrogance of primogeniture; but the Romans revered not the first-born; liberty did not glory in the vast possessions of her sons. The conquerors of the world were taught to subdue themselves, and to found their pride on the extended dominions of the state; content as individuals with limited patrimony, their ambition as a people was to acquire unlimited dominion. They followed the original impulse of nature and reason, implanting in the parental bosom equal love to all the progeny. The doctrine of primogeniture may be adopted by legislators, and

commended by philosophers, but it certainly originated with barbarians, and was nursed by savage pride. The preference of the male to the female line was equally unknown at Rome, nor was the daughter, any more than the younger son, left a dependant on the mercy, or a claimant on the justice, of the elder brother. The absurd consequences also, which arise from our marked distinction between the whole and half-blood, are the offspring of the feudal law, and strangers to the jurisprudence of Justinian.

As to quantities of estate, the proprietor of land might hold an estate for ever, not in fee simple, but allodially. I need scarcely remind my auditors, that the descendants of the Northern nations were all supposed to derive their lands from the prince, and to hold under him. Thus with us all land is supposed to belong to the king, and all we, petty men, walk under the huge stride of this collossean principle. The highest estate was but in fee simple, held by stipendiary service, feodum coming from *odh*, possession, and *fee*, wages. Of this haughty policy, born in camps, and bred by war, the Italian land-owner never heard, till wafted on the din of arms from the hostile regions of the North. With estates entailed, they are said, by Gibbon and many others, to have been utterly unacquainted, nor would commerce, which with us has undermined their effects, have had operation

upon a nation of warriors; yet something analogous they appear to me to have known in later times at least, under the name of substitutions, a name also given to some species of remainders, with whose nature they were intimate, both in theory and practice; and as frequently the T. in tail, or remainder man, not being a citizen of Rome, could not hold property, the heir was made trustee for him by what was stiled a *fidei commissary substitution*, which among other causes introduced the doctrine of trusts at Rome as extensively as among us; our trusts corresponding to their *fidei commissâ*, not to their *usus fructus*, as the name might at first hearing induce the student to believe. Their doctrine of incorporeal hereditaments is too minute to bear analysis at present.

We come now to their canons, for finding out the heir, or person to whom the estate was to devolve on the death of the last possessor. They fled the absurd principle which decrees that right to land never can ascend, and bequeaths the property of the childless and intestate to his most distant relation, in defiance of parental claims, echoed perhaps by indigence and affliction, for which preposterous rule my Lord Coke can assign no better reason, than that land is heavy, *et gravia deorsum tendunt*. With more reason may we justify that law of descent in England, which, in the search for a remote heir, guides us to the

blood of the ancestor from whom the estate first descended, and as it came from the paternal or maternal line, restores it to their family. But perhaps Blackstone himself, notwithstanding his particular labours in that point, has had no great success in defending the position which for ever excludes the half-blood from the inheritance.

Our canon of descent, however, has not always departed from the civil computation, since it makes the intestate or deceased, and not the common ancestor, the stem from which branch out all rights to personal estate ; but in the partition of the branches the analogy ceases, and in consequence of varying laws of representation, and divisions, *per stirpes*, not *per capita*, grandchildren in Britain frequently become entitled to very unequal portions of money or goods, where Rome would have observed exact equality. And in determining the gradations of consanguinity and affinity, the canon, and in regulating the degrees within which marriage is tolerated, the levitical laws are our guides and only luminaries, without the least respect to the dogmas of the disciples of Trebonian.

Not so has Britain viewed their principles of testamentary law. With implicit reverence here it has copied the wisdom of the western empire, with so little variation, that a comparison of preference is not admissible, where similarity ex-

cludes preference, save that which prior knowledge gives the teacher over the disciple. Our spiritual courts almost implicitly obey the law of *unsolemn* wills among the Romans, and although to casual observation, the obligations of the temporal tribunals to these funds of wisdom may seem less obvious, yet upon closer inspection, they will be found to boast but small original possessions in this important province of jurisdiction.

The solemn will of the Romans, like our will of lands, was rather considered as a conveyance or alienation *inter vivos*, than as a testament. In the earlier times of the Republic, the solemnities indeed were tedious, and the fictions extravagant; but the corrected regulations of later periods evidently furnished hints for the provisions in our statute of frauds; a connection most pleasingly elucidated by Lord Mansfield, in the celebrated case of Windham and Chetwind.

The law of legacies has servilely copied from the Imperialists, both excellencies and faults, so as even to admit their distinctions, however unreasonable, such as between time annexed to substance and to payment. In one species of legacies, however, attention to reason has made a notable difference, those conditioned in restraint of marriage. By the civil law, all conditions in restraint of marriage are void, yet here Chancery

has only followed them *sub modo*, where the legacy is given over, and another person particularly substituted by the testator to have the benefit of it, in case the condition be not complied with. *Reeves v. Herne*. 2. Eq. Ca. ab. 215. page.

With more wisdom have the institutes of the law of Scotland disclaimed any regard to subtilties peculiar to the Roman system, though they at the same time almost recognize it for their municipal law; and in matters of contract, transactions, restitutions, servitudes, tutorships, and obligations, determine all controversies accordingly. See *Erskine's Institutes*, p. 15. of *Laws in General*.

Besides the titles to estates arising from will and descent, those of prescription, custom, deed, occupancy, accession and tradition, were known to the civil law. With respect to occupancy, which Blackstone, differing from Locke, constitutes the foundation of all property, our determinations seem to have been chiefly deduced from the Imperial, as appears from the instances selected by that illustrious professor, respecting alluvions and derelictions of a river or the sea, a doctrine which, however unimportant it may to us in Europe appear, is at this instant of no small consequence in torrid regions, where sudden and violent alterations of the course of rivers occasion warm controversies as to the ownership of the new-found land, of which the Gauges is

a memorable example. Accession is a species of occupancy. If any corporeal substance received an accession by natural or artificial means, the thing thus rendered more valuable still belonged, in its improved state, to the original owner. If animals became pregnant, if cloth was embroidered, if ground was built upon or improved, the advantage resulted to the owner of the original subject; and these regulations were too obviously the dictates of good sense, not to compel imitation among us.

But if the rule be strained to convert a work of genius, written on the paper of another, into the property of the owner of the naked materials, it becomes so extremely absurd, that this ridiculous imputation on the civil law must surely have been derived from some passages ill understood; and I have no doubt that literary property was by no means in a state of insecurity, which would render it so much inferior to ours (2).

On the heads of custom and prescription, we find memorable variances between their law and ours. With us, the time of prescription is that which is opposed by no memory of man, or record to the contrary; but with them three years formed

(2) Intermixture of goods, one species of accession, by our law forfeits them to the innocent party, though by the Roman, a satisfaction was given to the wilful author of the confusion.

a prescription for things moveable and corporeal, and ten sufficed for things incorporeal and immoveable, if the persons prescribing inhabited in the same province; if in divers, twenty years.

The validity, however, of the prescription, *i. e.* whether it had been an uninterrupted possession for the three or the ten years, or whether it was a thing that could be prescribed for, might be tried in a real action, if brought within twenty, or a personal commenced within thirty. The allotment of periods for commencing these actions, corresponds with our statutes of limitation. The property even in things stolen, for reasons of general convenience, and public peace, was not controvertible at the end of forty years.

Every lawyer knows that our spiritual courts are prohibited from trying customs. The reason is, that being guided by the civil or canon laws, the first of which allowed ten years, the latter forty, to constitute a good custom, they would have adopted their precepts, and established customs as legal, though sanctioned by such brief duration.

Of title by deed, no other variation need be noticed except that delivery was not essential with them as with us; but the debt of our code to the civil, is most conspicuously shewn in the branch of title arising from contract, to which the civi-

lians have reduced almost every thing they have delivered on duties and rights. The obligation here is, indeed, so universal, we have so little of original fund, and the analogy is so complete, that we cannot be expected to mark diversity, except in some very few instances. These relate principally to the contracts of leasing and mortgaging, and to the consequence of certain contracts, viz. legal interest.

Leases for long terms were to them unknown, a species of interest which, though so frequent in this kingdom, is little used on the continent of Europe, and is surely not always essential to agriculture (3). It is even probable that they were unacquainted with irrevocable terms, and certainly the landlord claiming the farm or house leased, for his immediate occupation, had a right to resume it. But if here our policy may seem wiser, the civil law deserves praise, when it allows for the lessees losses by inundation, or any inevitable accident; whereas, with us, during the

(3) I mean, in countries where confidence supplies the place. Marshall Rur. Econ. Mid. Co. 2 vol. Min. 24. says, "It may be a moot point whether, under such confidence well placed, leases or no leases are most eligible." Gibbon and Young lament their want in France and Switzerland: yet, surely, agriculture did not pine in those countries. Picardy, when I saw it in 1779, before leases were much lengthened in France, was an ocean of corn.

term, as he is secure of all adventitious gains, so in several cases he must bear the loss (4). With respect to barring forcible entry, even of the landlord, and enforcing the right of resumption for arrears due after certain intervals, both systems coincide. From the assertion that long leases were unknown to the Romans, must be excepted their *Emphyteusis*, because, though they expressly excluded it from the class of leases, it bears a strong resemblance to fee farm tenures; it was a grant of land in perpetuity, on condition of improvement, with reservation of a trifling rent. It was made originally of barren land, to whose cultivation such encouragement was necessary; and as it was legally forfeited, for non-performance of the inherent covenants, and yet might be equitably restored, on satisfaction for the breach, we may reasonably conclude that the inventors of our leases for lives renewable for ever, drew their ideas from this source, on a tenure almost peculiar to this kingdom, as we know they certainly did on possessory bills, a mode of proceeding very usual in Ireland. And hence the modern practitioner might possibly derive some useful principles of direction.

(4) *E. G. Fire, and non-enjoyment in consequence, no suspension of the rent: however, a defence in an action of waste. Belfour v. Weston, 1 Term Rep. and see 2 Stra. 1763. 2 Lord Raym. 1477.*

The power of mortgaging among the Romans was more extensive than with us, since they could mortgage even things incorporeal, as debts and actions; whereas the rights to things, termed by the English law choses in action, are not transferable, from apprehension that they might become instruments of oppression in the hands of wealth and power.

Modern laws have a manifest preference, in invalidating unwritten mortgages; whereas, at Rome, the legalising parol mortgages, merely supported by three witnesses, gave scope by antedating the conveyance, to iniquitous preference, and variety of fraud. It is true, the guilty deceiver was there liable to the action of felonate or fraud, and in England loses all benefit of redemption, against the second mortgagee; but the registry acts of this kingdom, and the edicts of France and Holland, requiring the perfection of mortgages before public and national officers, form barriers much more effectual,

The civil law was inferior to ours, in allowing the creditor to sell the thing mortgaged by his own authority, after three notices to redeem, without obliging him, as we do, to appeal to some tribunal, which shall judge on the whole circumstances of the case, whether such alienation be conscientious or necessary.

On the law of interest we have plainly reason on our side. The civil law did not totally prohibit interest, but only where the borrower had derived no advantage from the loan. But the confined bigotry of churchmen, in the middle ages, rejected interest altogether; and the distinction between interest and usury, and the position that money might be hired at a price not exorbitant, like any other commodity, without crime or stain, could find no admission into those regions of darkness. The interested Lombard and the persecuted Jew were the unpopular oracles of truths so plain, and their profane lips were silenced by the whole thunder of the Vatican.

Having discussed the nature and foundation of rights, as considered by each law, our natural progress is now to Remedies for Wrongs. The necessity of obliging every man to pursue his legal remedies in a certain order, and to fashion them to some reasonable shape, without which disputes would find no issue, and suits wildly conducted, would terminate in endless confusion, have induced all nations to adopt certain forms of actions. These at Rome were long concealed by the professors of the law, to enhance their consequence, and aggravate their services; but being at length divulged by Cneius Flavius, formed a valuable part of the advocates library, under the name of *Jus Civile Flavianum*, and raised its promulgator, though of mean extraction, to

the office of *Tribune, Senator & Curule Ædile*. The Romans had their actions real, personal, and mixed, as many and various as with us, and adapted to each particular complaint. Churchmen, our first Jurists, well acquainted with these precedents, transferred an ample stock into our own *Officina Brevium*, and able Judges from thence struck light, which has illuminated remedial justice in modern days. The action of *assumpsit*, to avoid a tedious length of examples, may afford a conspicuous instance. And thus the *actio quasi publica* was the parent of our *qui tam* action.

These remedies were pursued in various courts, and before several orders of Judges. The nature of these judicial tribunals is wrapt in much obscurity, and the confusion is increased by their applying the name of Judges indiscriminately to the presiding power that directed in point of law, and to the assessors who judged of the fact. Down even to later times, the parties are always said to appoint their own Judges; and these *dicta* seem clearly applicable, not only to the Jury, if I may so call it, but to the court, a power so strange as to be scarcely reconcileable to our modern notions of wisdom and propriety, nor is it easy to conceive how Judges, thus chosen almost at random, should have been endued with competent knowledge; or how this power, seemingly of the wildest nature, should not have been productive of igno-

rant decision, and subversive of regular precedent. Certain it is, however, from express passages in the code, that before the time of Justinian, there were fixed and permanent tribunals; certain it is also, that they had distinct courts of law and equity. The doctrine of trusts contributed to this distinction with them as much as with us. On the doctrine of trusts, their law was fertile and prolix, and their *Prætor fidei commissarius* easily suggested to churchmen and civilians the idea of our modern Chancellor. Whether this distinction of courts has been, either among the ancients or moderns, wise, reasonable, salutary, or necessary, has been matter of much celebrated controversy between contending abilities of the first rank, and is a question spread over fields of argument infinitely too spacious for the range of our present course.

It will not be denied that this division of judicatures is attended with a certain awkward semblance of contradictory powers, and that, had it not been for the narrow decisions of courts of law, the prætorian authority of Chancery probably never would have raised its head; but Chancery must either have assumed its authority, or the court of law must have occasionally metamorphosed itself into a court of equity, or something not unlike it, a transformation liable to similar objections. The charge of encroachment on the legal jurisdiction, was prompted by ignorance,

or instigated by party (5); and the idea that this separate and distinct power is arbitrary, undefined (6) or capricious; (though, to the surprise of Britain, it was so depicted by an eminent Northern Jurist (7), who undertook to teach the English principles of equity), never had foundation, nor could have expected tolerance from an enlightened freedom for a moment; it is a power to supply that which is defective, and controul the harsh and unintentional applications of general rules to particular cases; it is not a power to make a new law, or dispense with an old one. It cannot be better described than it is by the Roman Jurists, *Juare, supplere, interpretari, mitigare, jus civile, potest; mutare vel tollere non potest.*

To the Judges of their respective courts, as well as to the advocates who attended them, certain rules were applicable, some of which have been imitated by us, and others neglected. The incapacity of sitting in judgment in the place or province of the Judge's nativity is the rule of their law, as well as of ours, and it may be

(5) From which imputation of party-spirit Lord Coke himself is not free.

(6) It is undefined in one sense only, as the causes that arise before it may be infinite and indefinite, that is, not reducible to any set form of legal action.

(7) Lord Kaimes.

hoped was better observed by them than by us. The regulation which commanded him to finish every criminal cause in two years, and every civil one in three, perhaps can only live under the meridian of an arbitrary government. But their rules with respect to advocates seem to have been admirably calculated to preserve the decency and honour of the bar. Their names were expunged from the roll of honour, if they bargained with either contending party for any part of the matter in contest, or inhumanly refused to defend the accused pauper, at the nomination of the Judge. For railing, and abusive language, they might be fined, suspended, and removed. They went through a *real* examination for admission, and might maintain an action for the honourable fruits of their labours. How far these regulations correspond to ours, is obvious to every person in the least conversant within the walls of the forum.

In both civil and criminal causes, the substantial parts were, the action, citation, libel, contestation of suit, answer of the defendant, the proofs, the conclusion, the sentence, and execution. Accidental parts, contumacy, exception, replication, satisfaction, transaction.

The form of trial was that which has been handed down to us in the courts ecclesiastical and in Chancery. The advantage of that power,

which can demand the defendant's answer upon oath, is acknowledged by the suitor in equity, who finds such assistance refused him by the limited hand of the common law. The written examination of witnesses, though it discovers not the guilty forehead, nor the trembling hand, possesses that mature and solemn investigation, seldom known to the hurry and confusion of a trial by Jury.

In complicated cases of property, therefore, many able men have thought this length of unhurried examination, infinitely preferable to that rapid torrent of captious interrogatories, which often derives credit to the advocate, from the confusion of the evidence, without drawing a single spark from the torch of truth, or adding the minutest weight to the arm of justice.

But in criminal prosecutions nothing can compensate to the accused for the refusal of liberty to meet the adversary face to face, and to confront the man who aims a deadly dart at his life and at his character; this is one advantage—the other is trial by jury. Here then the law of England triumphs: before a jury of his countrymen and his peers, acquainted by their vicinage with his character, and interested from their equality in his protection; openly accused, and legally defended, the guilty alone can tremble at the incumbent hand of justice.

The learned Pettingal maintains that the Centumviri were a jury; but if his analogy be not fanciful, their utility was at least confined to civil cases, for we never hear of them as a bulwark to liberty, or a shield against oppression. Indeed, the whole front of the Roman criminal law presents nothing but odious lines of sanguinary horrors, where every step of the legislature can be traced in blood. The iron crown, the agonizing wheel, the bed of tortures, present themselves to the abhorrent eye on every side; their ultimate punishments, savage in their nature, and foreign to their end (which is example, and not the pain of the individual), dilaceration by wild beasts, protrusion from the Tarpeian Rock, immersion, crucifixion, and scourging to death, are less shocking in narration to our feelings, than the previous engines used to extort confession from the prisoner, and to load with guilt the unfortunate object of Imperial resentment.

The Inquisition, a name now almost confined to the regions of Iberia, was the title of a proceeding familiar to the Romans. The long disquisitions in the digests on the subjects and incidents to the rack or question, are too repugnant to humanity to bear analysis. The oath *ex officio*, which, in contradiction to every principle, compelled the prisoner arraigned to accuse himself, and which long roused the just resentment of these realms (until banished, with universal

acclamation, at the Restoration), took its rise from the same detested font. There is scarcely an abuse of the criminal law, which in the last or preceding centuries drew down on its perverters the vengeance of an injured people, that was not suggested by the despotic genius of declining Rome.

Yet, amidst these severities, we are surprised to find glimpses of indulgence unknown to us, such as delivery of a copy of the indictment or charge to the accused in all cases, the refusal of which, however ratified by time, did always, in my opinion, cast upon our jurisprudence the complicated stigma of harshness and absurdity (8). Privileges, similar to those of the *Habeas Corpus* act, had early existence at Rome, and indefinite imprisonment without trial was unknown. In some instances, a violent revolution to clemency even favoured of the Mosaic rules of compensation, and refused to punish theft with death until the days of Justinian.

Here, however, upon the whole, is the glory of Britain and of Ireland; and though we must

(8) This opinion is supported by the author of the Preface to the Second Edition of the State Trials, justly admired by Mr. Hargrave: he ably answers the objection that it would give room for captious exceptions. If they are really captious, they ought to be disallowed; if they go to the merits of the cause, why should not the prisoner have the benefit of them?

recollect that counsel, by the common law, is denied to the culprit, and that it was only in the century before the last that he was allowed to produce a witness; yet it is our happiness to reflect, that the errors of our ancestors are almost matters of historic curiosity, or at most, lights on a distant shore to guide our paths to peace and security. The trial by jury, while preserved inviolate, is a palladium which will for ever secure us from a repetition of encroachments. May it be our pride to guard its sacred rights, and preserve its avenues from pollution. And if no other utility was derived from the study of the civil law, but the satisfaction of observing, in triumphant contrast, the super-eminent attention which ours has paid to the rights of the subject, it would be a recompence to the philosophic student, and sincere lover of his country.

RIGHTS OF PERSONS.

PREFATORY REMARK.

THIS work proceeds at once to the rights and duties of persons, in their private relations, omitting those which arose at Rome, from the public relations of magistrates and people, the latter being well known to the theoretic scholar, and to the practising lawyer now of little or no concern, except to warn him of the ill use formerly made of them, to support ship-money, dispensing power, &c.

ON THE CIVIL LAW.

BOOK I.

OF THE RIGHTS OF PERSONS.

CHAPTER I.

HUSBAND AND WIFE.

THOSE branches of the civil law, to which modern institutions bear no analogy, and which therefore only tend to satisfy curiosity, or illustrate history, may be here treated in a more slight and general manner. Such, for example, are servitude, paternal power, and adoption; but where the rules of the Roman code have given rise either directly, or by analogy, to the regulations of our laws, or where they form the law and practice either of our maritime or ecclesiastical courts, I must beg leave to unfold them more minutely and in detail. This is peculiarly the case on the subject to which we now proceed, the relation between husband and wife, the contract of mar-

riage. In many instances the law of marriage, both in our temporal and ecclesiastical courts, is derived from the Roman institutions; indeed, in most, except where the precepts of our holy religion have interfered, and forbade the admission of rules contrary to its purity. The subject is the more important to the civilian, because it constitutes one grand division of those causes which come under the cognizance of the spiritual courts, which are (except those which are merely *pro salute animæ*) divided into pecuniary, testamentary, and matrimonial(1).

Marriage is considered in various lights by different laws. The Roman had respect principally to its civil effects, as it produced in the husband and wife a mutual participation of benefits and right; it was therefore defined, *omnis vitæ consortium, humani & Divini Juris communicatio*. I do not mean that the Romans omitted all religious rites on the perfection of this contract, but their laws viewed it merely as a civil covenant, however Heaven might preside over its ratification. Those rites were not any part of its essence; it was good without them. The canonists consider it in a religious light, and

(1) It may surprise the peruser of the Institutes of Justinian to find so important a subject there so slightly touched upon; the reason is this, the Emperor in the Institutes merely introduces it collaterally as one of the foundations of paternal power.

define it a sacrament peculiar to the laity, by which a man and woman are joined together according to the precepts of the church. Among protestants it is considered, partly as a holy union of Divine institution, partly as a civil contract; in the latter view alone it is regarded by the temporal courts; its sacred bonds being left entirely to the guardianship of the spiritual tribunals.

I shall first consider how marriages were created at Rome; secondly, the effects of this relation; thirdly, how they were dissolved; marking, as we proceed, how the different views of it above-mentioned have occasioned the canon and our law to differ from theirs.

With respect to the first head, how marriages were contracted—in this, as in all other contracts, the parties must, by the Roman law, as by ours,

First, be willing to contract.

Secondly, able to contract.

Thirdly, must actually contract.

Fourthly, to *produce certain legal effects*, the marriage must have been actually celebrated with particular rites and ceremonies, which, however, were not part of its essence, nor requisite to make the contract complete, as they are with us.

First, Willing—It is evident that free consent is necessary to constitute a valid marriage; it

would be flagrantly absurd to allow the brutal ravisher to form, by acts of violence, an indissoluble union. The maxim therefore of the Roman law, as well as of ours, is, *Consensus non concubitus facit nuptias*; if then error, fear, or force intervened, the marriage was void, because consent, which is essential to it, was wanting. But as it would be much too general a position to say, that all error vitiated a marriage, it may be useful, by one or two examples, to point out what manner of error was fatal. An error in the person vitiated the marriage, *e. g.* if we suppose one of the parties drawn by some disguise or deception into a contract with a person they did not intend, and whom they mistook for another; an error in an essential quality was fatal, as *e. g.* with respect to impotency (2) or affinity: an error in an accidental quality was not; for instance, in fortune or temper (3): for weak indeed would be the nuptial tie, if liable to be broken on account of imperfections discovered after marriage,

(2) This objection is considered, by Mr. J. Blackstone, under the head of Disabilities. The reader here will observe, that though the general classification corresponds with that of the learned professor, there is no similitude in the arrangement or successive order of the inferior points. *E. g.* Again, idiotism, classed by him as a disability, is considered by the civil law under want of will, and the distinction of disabilities into those attended or not attended with turpitude, is not used by Blackstone.

(3) The French have made temper a cause of divorce.

and mistakes with respect to fortune, if not occasioned by fraud, deserve no pity; if attended with fraudulent circumstances, can only furnish a ground for pecuniary compensation.

On this head of error the laws of these countries do not differ from those of ancient Rome (4). Of marriages disputed on account of alledged error in the person, (though such an event, however frequently made an instrument of the drama, seldom occurs in real life), an instance has occurred within my own experience; errors in essential qualities, even if we can suppose the parties willing, operate as disabilities, and make the marriage voidable; and errors in accidental affect not its validity.

An error occasioned and produced in one party by the other, in order to break the marriage, shall not avail the deceiver, such as misnaming himself or herself, unless where the error respects some disability (as consanguinity), or occasions the omission of some requisite expressly insisted on by the positive law; for example, that of the person celebrating the marriage being a clergyman in holy orders; but when the spiritual courts in England were allowed to enforce contracts *in presenti*, which they could until the marriage act, (and no such act having passed in Ireland (5), are still

(4) To the errors in essentials above-mentioned, the Mosaic law added an error in respect to virginity.

(5) This difference between the laws of the two countries is worthy of observation.

allowed to do in that country, where there is no subsequent marriage with consummation) it would seem that if the marriage had been celebrated by a layman disguised as a clergyman, the judge should have decreed a celebration *in facie ecclesiæ*, because, though not properly a marriage, it was a contract *de præfenti*.

The consent must be given without fear; but under the name of fear is not comprehended filial respect and reverence, inducing the child to pay attention to the wishes of the parents, if on their parts there be no force, personal violence, or menaces: if it be a fear, according to the language of the civil law, *a quo absunt verbera, vincula, minæ*, it must not be forced: hence marriages celebrated by force are void; and by the civil law, the consent of a party forcibly carried away from the family and married, whether given precedently or subsequently, did not confirm the marriage; by our laws, a precedent consent (in such a case), in some instances, does not confirm the marriage; a subsequent in scarce any: but this disability in the persons carried away, to ratify such forcible marriage by their consent, depends on particular statutes, and is confined to the cases mentioned and described in those statutes (6).

(6) The principal of these statutes are,

in England,	in Ireland,
3 Hen. VII. ch. 2.	31 Hen. VI. ch. 9.
39 Eliz. ch. 9.	3 Hen. VII. ch. 2.
4 & 5 Ph. and Mary, ch. 8.	10 Car. I. ch. 17.
	6 Anne, ch. 16.
	19 Geo. II. ch. 13.

Prostitutes, by the Roman law, were not entitled to this protection from force; but our laws, regarding the rights of humanity, as well as the public order and peace, have given them in this respect the same immunities with other women.

Under the head of marriages void for want of consent of parties, may be included those of idiots and lunatics, who, having no free will, are incapable of consent, and were therefore, by the civil law, incapable of contracting matrimony. By the old common law of England, idiots and lunatics were ~~absolutely~~ permitted to marry; but by the English statute, 15 Geo. II. ch. 30. the marriage of a lunatic, found to be so by virtue of a commission, or whose person and estate are by act of parliament entrusted to others, *is in that kingdom* declared to be null and void (7); and in Ireland, the marriage of a lunatic, if not proved to be in a lucid interval, would be determined to be void.

Secondly, Able—Now let us suppose the parties willing, we proceed to the causes which may disable them from contracting; these were divided by the civil law into such as were attended with turpitude, and such as were not. Under the former class of those free from turpitude, they reckoned

(7) This act is sometimes called the Bradford Act, as said to have been introduced by Mr. Pulteney, to prevent Lord Bradford, to whom he was next in remainder, from marrying.

infancy—want of proper consent—alienage. Under the latter, such causes as rendered the marriage incestuous, indecorous, or noxious. We shall consider them in this order :

1st. Infancy—By infants, in the civil and ecclesiastical laws (in relation to marriages), are meant children under the age of seven (8). Such could not even contract espousals (9) ; between the age of seven and puberty, which, by the civil law, as by ours, was fourteen years in the man, twelve in the woman, they might contract espousals, *i. e.* make contracts *de futuro*, or mutual promises of future marriage, but not marriage contracts *de præfenti*, or by words of the present tense.

At the age of puberty they might agree or disagree to the contract by marrying or refusing to marry ; so they might if one only of the parties were under the age of puberty, on that party's arriving at such age. The canon law respected habit, not years, in determining who were of the age of puberty, which therefore, according to the canonists, must differ in different persons. If persons under the age of puberty married *de*

(8) With respect to other acts and powers, infancy had other meanings, lengths, and periods.

(9) The marriages of princes were excepted for reasons of state. Swinburne, in his Travels, mentions having seen, at Palermo, two young ladies of eight years of age, who had been even then espoused or betrothed, appearing at balls with their future husbands.

facto at Rome, the wife was considered only as a spouse; the husband could not sue for her dower; if repudiated, she had not the *actio rei uxoriæ*, nor could she upon this event recover a legacy bequeathed to her, to be paid at the time of marriage.

Our law here differs from the civil. A contract *de futuro* is of no force, if both the parties are under the age of twenty one years (10); if one only a minor, is voidable at the election of that minor; it differs again in this, that with us marriages *de facto* with persons under the age of puberty, are considered as more than spousals, as actual marriages; for though either party, on coming to the age of puberty, may disagree to the marriage, yet if there be no such disagreement, no second celebration of the nuptials is required; if indeed one of the parties disagrees, the marriage is void without any sentence of divorce (11). Such cases in latter times have rarely happened; but formerly questions have arisen, whether these marriages, notwithstanding disagreement, should not be considered as valid with respect to third persons (12).

(10) *Holt v. Ward*. Strange.

(11) Godolphin, p. 479.

(12) *Vide Leigh and Hanmer*, Leonard 53. The case was thus: a bond was given by Leigh, conditioned that his son should marry Sir Thomas Hanmer's daughter; they intermarried, the son being twelve, the daughter nine; Leigh's son at fourteen, his age of puberty, disagreed to the marriage. An action was brought on the bond; adjudged that

2d. Disability—Want of consent of parents or guardians. No consent was wanting but that of the parties themselves by the canon and our common law; for though, by the feudal system, the want of consent of the King or Lord subjected the party to forfeitures, yet that did not invalidate the marriage. In the civil law the consent of the father was indispensably necessary to the validity of the marriage, until the child was emancipated; hence great difficulties arose when the father was insane, in captivity, &c. till by later regulations the magistrate had a power in such cases to dispense with the necessity of consent (13). In some

its condition was fulfilled, and that the marriage under puberty, though the parties had a power of afterwards disagreeing, was thus to be considered a good marriage as to third persons.

(13) The necessity of parental consent is agreeable to reason, otherwise filial irreverence is encouraged, and rash and imprudent connections follow, attended with misery both to parent and child. It is also agreeable to the Divine law, which makes marriages without such consent voidable. Isaac, Jacob, Sampson, Exod. xxii. v. 17. Though a man seduced a maid, the father might refuse her to him, ergo a fortiori, &c.

Deut. vii. v. 3. The Israelites were forbidden to give their children in marriage to the children of Canaan.

1 Corinth. ch. vii. St. Paul speaks of persons giving or refusing their children in marriage.

Yet the Council of Trent severely condemned those who hold that marriage without consent was voidable; and many writers on the canon law have maintained, that such consent, though decorous, is not essential to the ratification of the marriage by that law.

cases, for want of a father, the consent of mothers or guardians was required. If consent was unreasonably refused by the father, there was no remedy; if by the mother or guardian, the magistrate had a power of interference, and might allow the marriage. In Holland the consent of parents or guardians is necessary to twenty-five. In France until thirty. The legislature of England in later times has adopted the same policy, and by various statutes has made the consent of parents or guardians, until the parties are twenty-one, an indispensable condition to a good marriage. Hence in England the age of twenty-one is become the full and perfect age, in respect to marriage, as it always was with respect to many other acts. Of these English statutes, the principal is usually known by the name of the Marriage Act, 26 Geo. II. which never was enacted in Ireland, but certain acts have passed in that kingdom, particularly 9 G. II. ch. 11. and 23 G. II. ch. 10. to invalidate by suit in the ecclesiastical court, (to be commenced within a year) the marriages of persons *having estates to a certain amount* therein specified, who marry under twenty-one without consent of parents or guardians. The Irish canons require their consent in all cases where the parties are under the age of twenty-one, and at any age if they are married by licence(14), except in case of widowhood.

(14) The propriety of the English Marriage Act has been a subject of great controversy: against it was urged the de-

3d. Difability—The parties not being Roman citizens. This followed from the Roman definition of marriage, and the light in which they considered it; for how could others participate all rights, divine and human, when none but Roman citizens were entitled to those full and complete privileges? The participation of divine rights was of great consequence to a Roman wife, *e. g.* her being admitted to the sacrifices offered by the husband, while the empire continued to be heathen,

crease of population and licentiousness which it would occasion. It was answered, that parents were not apt to refuse their consent to reasonable matches, but must wish to see their children settled; that any perverse opposition from the parent could only retard the marriage until twenty-one, no great age for entering into that union; and that hasty marriages do not tend to make the people happy, or the nation prosperous, or add to the felicity of either children or parents.

This act is supposed not to extend to Scotland, but Lord Mansfield expressed great doubts upon that point.

However, Mr. Hargrave says this point seems now fully settled in favour of Scotch marriages by a decision in the court of arches, afterwards confirmed by the delegates in that kingdom.

It is said to be rendered totally nugatory by having the banns called in a parish where a party has resided a certain time for the purpose, but where, notwithstanding such residence, the banns may be called without the knowledge of any parties concerned to prevent it; for this trick is said to be a security from the act.

The Royal Marriage Act, 1772, is also sometimes emphatically called the Marriage Act.

because without such participation there were many civil rights to which she was not entitled. Marriage with them meant the union of persons entitled to every right that human nature is capable of; hence the union between citizens was called *Nuptiæ* or *Connubium*;—with other free persons, *Matrimonium*;—and between slaves themselves, *Contubernium*. Vide Heineccius.

Having now gone through the disabilities, which are merely temporal, or not attended with turpitude, we proceed to such as are, or at least have been, so accounted. Marriages forbidden by the civil law, on account of the latter, are classed under,

- 1st. Incestuous,
- 2nd. Indecorous,
- 3d. Noxious.

Incestuous.—In order to understand how far the disability arising from consanguinity or affinity has been extended by different laws, we must trace out their respective methods of computing the degrees (15) of kindred among collaterals (16). The civil law reckons upward (17), from either of the persons related, to the common stock, and then

(15) *Gradus est Distantia Cognatorum.*

(16) It is evident the degrees of kindred, in the right line, must by all laws be reckoned alike—*i. e.* as many degrees as there are generations.

(17) This was the Jewish mode of computing, and is the fair and natural one, says Bacon, *Ab. 3* vol. p. 572.

downward again to the other; reckoning a degree from each person to the next, both ascending and descending.

The canon law (18) begins at the nearest common ancestor, and counts downward; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. E. G. cousin germans are, by the civil law, in the fourth degree to each other; by the canon law and by ours in the second degree. This being premised, the rules of the civil law are easily understood, and may be reduced to *two*.

First, Marriages between persons in the direct line, whether ascending or descending, are prohibited *ad infinitum*.

Note.—*This rule is common to the three laws.*

Secondly, In the oblique equal line, (*i. e.* if both persons are equidistant from the common stock,) the second degree is within the prohibition, the fourth not. In the oblique unequal line (*i. e.* if one be more remote from the common stock than the other,) all degrees beyond

(18) The rule of the canon law is thus expressed :

Linea transversa æqualis.

In Quoto Gradu unusquisque distat a Stipite; eodem inter se distant.

Linea transversa inæqualis.

In Quoto Gradu Remotior distat a Stipite; eodem distant inter se.

the third are legitimate degrees, unless one person be *in loco parentis* to the other (19). There are no degrees of affinity, in propriety of speech, because no generations of blood ; but, by analogy, a rule is applied to them, viz. in whatever degree any person is related to me by blood, in the same degree is the consort of that person related to me by affinity (20).

The canonists, eager to augment the restraints upon marriage, in order to increase the necessity of dispensations, were not pleased with these rules, or with the civilians' method of computing degrees. They therefore adopted the method of computation mentioned above, which brought all persons within nearer degrees of kindred than before, and extended their prohibitions to the fourth degree, in the equal collateral line, and even further in the unequal. Not content with these alterations, they invented new restraints, arising from spiritual relationship, *i. e.* from having the same godfathers or godmothers, and extended their prohibitions to the seventh degree

(19) By persons *in loco parentis* to us, the Roman Law meant persons nearer the common stock than we are.

(20) Yet some exceptions ; by these rules cousin germans might marry, yet often forbidden by the Emperors before Justinian. A man might marry his niece, not his aunt. Yet the niece was prohibited after the time of Constantine, I suppose for being within the levitical degrees.

of this relation, until the council of Trent restricted the prohibitions of marriage, arising from baptism, to the second degree.

Although in these countries the method of the canonists in computing degrees is adopted with respect to real estates, and that of the civilians as to personal, yet neither are applied to the disabilities of marriage. A statute of Hen. VIII. which is in Ireland, 33 cap. 2, has ordained that no degree of kindred shall be a prohibition to marry, except such as is made prohibitory by God's express law, or such as comes within the same reason. The degrees of kindred therefore, to which we are to look, to know whether marriage be prohibited on account of consanguinity or affinity, are the levitical degrees. The inability to marry persons who are *in loco parentum*, does not exist with us (21).

Marriages were prohibited by the civil law as indecorous, 1st between senators and emancipated slaves, or other persons of mean condition. 2d, Between a man, and a woman who was an actress, a prostitute, an adultress, or who had been convicted of heinous crimes. 3d, Between parties who had committed adultery to-

(21) A man had married his great uncle's wife; a libel was exhibited against him to annul the marriage. Prohibition was obtained, for it is within the levitical degrees; yet he was to him *loco parentis*.

Dr. Harrison v. Burwell, Vaughan.

gether (22). 4th, Between the ravisher and the ravished. The first prohibition as to senators, however, was taken away by Justinian. The second and third are unknown in the canon law, or in our common law.

Noxious—First, marriages were prohibited among the Romans as noxious, between Christians and Jews. To this, forbidding the intermarriages of protestants and papists, may bear some comparison as to their policy.

Secondly, Between guardians or their sons, and their female wards, before they have rendered an account, and between provincial governors, or other public officers in the provinces, and provincial women (23).

Thirdly, The marriages of the clergy, or others who had made a vow of chastity. But this must be confined to marriages subsequent to their entering into the ministry, for marriages contracted before, were not, by the civil law, dissolved on taking orders, and those in the *lower* orders might marry *once* after being ordained. *See Code, lib. 3. tit. 19.*

Fourthly, Between persons who, or one of whom, were married already to some other, still living.

(22) This, though often spoken of in the house of lords, never has been enacted in these realms.

(23) Compare with this policy, the ancient laws forbidding marriages between the irish and english.

By the civil law, polygamy is expressly forbidden. In these countries a former marriage not only invalidates a latter, but subjects the party to the penalties of felony, unless there has been a precedent separation *a mensa & thoro*, which, though it does not confirm the second marriage, prevents the felony. At Rome frequent attempts were made to abolish the laws against polygamy, but without success. Julius Cæsar entertained such a design, but did not carry it into execution. Valentinian I., wishing himself to take a second wife, allowed the practice though it had ceased to be common. Justinian forbid it expressly among the Romans; and Theodósius, Arcadius and Honorius, extended the prohibition to the Jews (24). Among modern civilized nations, polygamy has scarce ever been legalized, not even in Muscovy: Charlemagne, at that early period, punished it as adultery. It is remarkable, that the Mahometans, at present, though they practice it themselves, are said to forbid it to the Jews (25).

(24) Among the ancient nations, the Persians, Athenians, Parthians, Thracians, practised polygamy.

(25) This practice has been defended by appealing to the practice of the patriarchs, particularly Lamech, and of the whole jewish nation. But, says St. Austin, what is that to us; we are forbidden by the positive revealed law, they were not. Besides, others maintain that Lamech was severely reproached by his conscience for this act; and if it was indulged to the Jews at all, it was rather permitted to the hardness of their hearts, than encou-

It is not wrong, say the polygamists, because it is not contrary to the end of marriage, which is encreasing the species. This is not consonant to experience, for it is not found to encrease population. Turkey is an instance (26).

It has also been defended as necessary in hot climates. The roman law giver did not think so, for he enacted these prohibitions for the meridian of modern Turkey. A defence of the practice has been lately attempted by a doctor Madan, whose work has not even the merit of novelty; the same notions having been broached long before by Lyferus, a native of Saxony, who wrote about 1683. Successive polygamy (27) subjected persons at Rome to several penalties and incapacities. By the canon law it is esteemed indecorous, but not forbidden. Marriage within the year of mourning is severely condemned by both.

raged, as was the case with respect to their divorces. Vid. St. Matthew, ch. 19. v. 8. Texts quoted against it are, from Genesis, ch. 2. v. 18. where two only were joined together, &c. and 1 Corinth. ch. 7. v. 2. Let every man have his own wife, and every woman her own husband. Arguments against polygamy, from the confusion it introduces into families—from the neglect of the childrens' education, &c.—See also, Vinnius, p. 49.

(26) China seems an instance to the contrary.

(27) By successive polygamy is meant, a subsequent marriage after the death of the first consort.

I have now gone through the causes which, according to the civil law, rendered persons unable to contract marriage; and have classed them as that law does, under such as are attended with turpitude, and such as are not. The more usual division of these disabilities in the english law is, into canonical and temporal. The former are consanguinity, affinity, impotency and pre-contract. These render the marriage voidable by sentence of the spiritual court, if passed in the life-time of the parties, but not after. The latter render it *ipso facto* void, and are, want of age, prior marriage, idiocy or lunacy, want of consent of parents or guardians (28).

(28) This distinction between marriages void and voidable, not having been sufficiently, in my opinion, explained by rudimental writers, not excepting even the two learned writers who have filled the vinerian chair, I will beg leave here to insert my ideas on the subject.

Void and voidable marriages differ little as to their effects, when the latter is actually avoided; for example, if a marriage be avoided, as being within the levitical degrees, or of a minor, having a certain fortune, under the statute in this country, the sentence has a retrospect, and makes it void *ab initio*; but if no such sentence during the life of the parties, in the first case, or within a year in the other, the marriage is good, and never can be avoided afterwards. It is, therefore, until sentence, a marriage both *de facto* and *de jure*; and so for ever if no sentence within those limited times; but a sentence, if passed within those periods against it, has a retrospect, and totally destroys its *de jure* effects from the beginning; it is in its origin *de jure*, and

We now proceed to the third grand requisite to a valid marriage, viz. that the parties should actually contract; under which head comes also the consideration of precontract: these contracts naturally divide themselves into contracts *de præsenti*, and contracts *de futuro*; the former, in the roman law, made and formed actual marriages, though of the unsolemn sort, without any actual ceremony necessarily attendant on them. The latter, being promises of future marriage, were usually

may for ever be so, or, *e contra*, all its *de jure* effects may be destroyed *ab initio* by a subsequent sentence.

To explain—The issue of persons marrying, though within the levitical degrees, are legitimate, (a *de jure* effect) if no sentence during the life of the parties; if there be such sentence, are bastards. Now mark the difference of a void marriage, as *e. g.* for bigamy or idiotism; it never was *de jure*; it was void *ab initio*, the sentence does not make it void *ab initio*, it only declares it to have been so; in these cases, therefore, a sentence is not necessary; *nor do I think it more so in cases of marriages by force and compulsion, however it may be prudent, though Mr. Woodeson seems of a contrary opinion.*

Lord chief justice Hale says, the sentences of the ecclesiastical courts do sometimes introduce a real effect, without any other execution; as a divorce a vinculo matrimonii for consanguinity, or frigidity, doth induce a legal dissolution of the marriage, so a sentence of deprivation from an ecclesiastical benefice doth, by virtue of the sentence, without any other coercion or execution, introduce a full determination of the interest of the person deprived. *History of the Common Law, p. 33.*

attended with the deposit of an *arrha*, or earnest, which, on breach, was forfeited (29).

The canon law considered them with a more curious eye, (and as contracts *de præsenti* were present matrimonial agreements, wanting nothing which the parties could contribute to form a marriage, but not celebrated by a priest) it considered them as marriages in conscience, and compelled a celebration in *facie ecclesiæ*, extending the same privilege to contracts *de futuro*, if followed by consummation. These rules of the canon law were early adopted in England, and precontracts, so circumstanced as above, invalidated future marriages. The law in this respect in England underwent various changes, until ultimately the marriage act forbade the enforcing of any such contracts; and thus, by implication, abolished the impediment of precontract. We have not that act in Ireland, but we have an act, 12 Geo. I. ch. 3. which enacts, that no contract without consummation, shall be of any force towards making void a subsequent marriage consummated.

Ultimately, the mere consent at Rome made a marriage, without any outward ceremony what-

(29) Promises to marry are also the subjects of actions in temporal courts, but must be distinguished from promises in consideration of marriage, as to pay money, &c. these latter, by our statute of frauds, are invalid, unless in writing, and signed by the parties, or their agents, properly authorized. Statute of frauds is, in Ireland, 17 W. III. ch. 12.; in England, 29 Car. II. ch. 3.

ever; yet, to produce certain legal effects, the marriage must have been celebrated with certain forms and rites, or established by time; such marriages were called solemn (30), and were of three kinds, confarreation, coemption, and use: confarreation was attended with sacrifices, and *eating in communion of the same bread*, in presence of a pontiff, or flamen dialis, and ten witnesses; it was the most solemn and religious form, and the woman thus married partook of all her husband's fortunes and sacrifices; it was in the earlier times common to all, but afterwards confined to priests and pontiffs only, or those whose children were destined for the priesthood; it ceased to be commonly used about the time of Tiberius. *Coemption* was a fiction whereby the parties were supposed to purchase each other, and each of them laid down a piece of money for that purpose before priests and witnesses; hence, the concubine, who was not an harlot, but a kind of inferior wife, (like the wife *a main gauche* in Germany (31), was called *uxor gratuita*, as not being married by

(30) These solemn marriages were properly *nuptiæ*, though that word sometimes signifies the nuptial banquet. Taylor distinguishes it from *matrimonium*, differently from Heineccius.

(31) This marriage, called *morganatic* in Germany, is when a noble person marries a person of inferior condition; her children do not inherit, but her character is unspotted, and her husband obeys the impulse of his love without sacrificing his pride.

coemption or purchased. 3dly. Use or cohabitation, which, if continued for a year, *mariti animo*, constituted a solemn marriage. Before the year ended, the wife was *matrona*; afterwards, *materfamilias* (32).

In all these solemn ways of marriage, the wife was said *in manum convenire*, that is, the husband acquired a power very similar to the paternal, both as to her person and estate, which became so distasteful to women, that latterly they fell into disuse, and mere consent (which was to be gathered by any conclusion that could be made) without any rite or ceremony, was the usual method; wives, therefore, to avoid the solemn effects of cohabitation, contrived to be absent three nights in each year, for a marriage was not effected by use in less than a year, and that uninterrupted for more than two nights. So that marriage by use, Dr. Taylor truly observes, was like taking on trial, or being upon liking, until ratified by a year's cohabitation.

(32) This is commonly said to be the law of Scotland, but I think it safest to transcribe the words of one of their legal writers; "Marriage in Scotland is fully perfected by consent, which, without consummation, founds all the conjugal rights and duties."—*Erskine, book 1. tit. 6. sec. 2.*

It is not necessary in that country, that marriage should be celebrated by a clergyman, the consent of parties may be declared before any magistrate, or simply before witnesses; and though no formal consent should appear, marriage is presumed from cohabitation.

It remains to note some ceremonies which attended the actual marriage among the Romans. The bride's hair was dressed after the manner of the vestals; a yoke was put round the necks of the married couple, whence *conjugium*; a ring was sent to the bride; the bride was torn from the mother, who made a feigned resistance, in memory of the rape of the Sabines; she was then carried to the husband's house, *domum deducta*, the friends singing before her, *Hymen, O Hymenæe*; at the portal, fire and water were presented to her, intimating that she must share her husband's fortunes and sacrifices; she was then, with certain rites, made participator of the protection of his lares and penates, which was called *Sacrorum Communio*, and which gave an inheritance in, and a right of succession to, his sacred rights, and almost, by necessary consequence, to those which were temporal; and hence, as the lares could not be moved, the *domum deductio* (33) became a necessary part of the rites and customs, from whence the man was said *ducere uxorem*, as the woman *nu-*

(33) The *domum deductio*, was the only ceremony of old in England; before the time of Innocent III., there was no solemnization of marriage in the church, but the man came to the house where the woman inhabited, and led her home to his own house. See Moor, 170.

In Scotland they have the marriage by use; living together as man and wife, or declaring themselves so before witnesses, makes a valid, though informal marriage. It need not be celebrated by a clergyman.

bere. Whoever wishes to know more of this ceremonial, must consult Heineccius, Terrasson, &c.

These ceremonies of course ceased after the empire became Christian; but it does not appear that they were succeeded by celebration by a person in holy orders, for marriage, as is observed in the foregoing note, was not celebrated by the clergy till the time of Innocent III.; until that time, therefore, mere consent and contract, to be collected as was said above, from variety of circumstances, made a marriage.

Let us now see what circumstances are required (besides an actual contract *between* parties willing and able to contract) to the validity of a marriage by the laws of England and Ireland.

Marriage must be preceded by a publication of banns, or by a licence obtained (34); and must be performed by a person in orders, in a parish church or chapel, unless by a special dispensation, and *during* the canonical hours, *i. e.* between eight and twelve in the forenoon.

The omission of any of these requisites, except that which relates to canonical hours, is made

(34) Before the granting of *any* licence, say the letter of the canons, two known persons must swear to parents consent; hence I have said above, it is requisite at *any* age to a marriage by licence; but from the general context of the canons, it is natural to suppose, their spirit extended only to persons under twenty-one; one of the parties also must swear there is no impediment, and a bond must be entered into to these effects.

fatal to the marriage in England by act of parliament. In Ireland, though it makes the omitting parties, and particularly the person celebrating the marriage, subject to penalties, yet none of these requisites are essential to the marriage, except, that it be performed by a person in orders, which rule itself is *positivi juris*, marriage not having been celebrated by the clergy in the earlier times; and, formerly, it was held, that a marriage by a layman, erroneously instituted to a cure, was good (35).

(35) But it must not be conceived, that the marriages of protestant sectaries must be by a clergyman of the church of England; if their marriages are solemnized according to their own rites, and both parties are of the same persuasion, they are good to all civil effects; for instance, to support an ejectment where legitimacy comes in question, or an action for criminal conversation; but, if they come to entitle themselves to any rights in the ecclesiastical courts, as to administration, they must prove a marriage according to the ecclesiastical law. 1 Salk. p. 119.; this is the case in England, and was so in Ireland before the 21 & 22 Geo. III. ch. 25, which enacts, that all marriages celebrated between protestant dissenters by protestant dissenting ministers and teachers, shall be as valid, and the parties entitled to every right as much, as if solemnized by a clergyman of the church of Ireland; to this act one main objection was evident, that the meaning of protestant dissenter not being sufficiently, if at all, defined, members of the church of England might call themselves protestant dissenters for this particular purpose, and thus evade the necessity of banns or licence; but for the able protest against this bill, signed by an uncommon number of peers, see the appendix.

Omission of any other of the circumstances, above enumerated, merely subjects the clergyman offending to penalties prescribed by the canons, viz. of deprivation, or degradation, without breaking the bonds of matrimony, in this kingdom.

Having now enumerated the various modes of marriage, and the impediments (36) to this contract, method would lead me to describe its legal consequences; but it may be useful, previously, to note some miscellaneous subjects, not reducible to any of the preceding heads. These relate to offences against the rights of marriage—to the penalties of illicit and clandestine marriages—to conditional restraints on marriage, and to marriage brocage bonds, or agreements.

Forcible marriages and abduction were, by the roman law, considered as equally criminal with rape, and each of these offences was punished with death. With us, the law on this head depends on various statutes (37).

(36) Among these impediments one has been omitted, not very generally noticed; the canons forbid clergymen to marry persons who cannot say the creed, Lord's prayer, and ten commandments; might not the fashionable world be sometimes puzzled by a clergyman strictly obeying this dictate.

(37) By 10 Car. I. Irish, taking or conveying away a maid or woman child, unmarried, within sixteen, if done by any person above fifteen, punished with two years imprisonment; taking away and deflowering, or marrying, such per-

As to illicit marriages, the institutes, after reciting the prohibitions of marriage, declare, that if any persons presume to cohabit in contempt of the rules above recited, they shall not be deemed husband and wife; neither shall their marriage, or any portion given on account of such marriage, be deemed valid. The code added also pecuniary mulcts, infamy, *et cum infamia pœnam stupri* (38), which was confiscation of half the goods.

Our laws bear a strong general analogy; they, in numerous cases, make clandestine marriages, and those illicit, (whether so from attention to the law of God, natural or revealed, or from reasons of state) void or voidable—and where they

son, five years imprisonment; the woman loses any lands she might have during her life.

By 6 Anne, ch. 16, seducing and marrying heiresses under eighteen, punished by three years imprisonment, and their estates vested in trustees. By the same act, if any maid or woman be carried away by force, and afterwards married or defiled, *with or without her consent*, felony without benefit of clergy. The english statutes, on these subjects, are too well known to require to be inserted here.

(38) *Stuprum est, quod virgini vel viduæ honeste viventi sine vi infertur*—this is its definition in the pandects; which Wood thus explains, *Stuprum*, says he, is when an unmarried man lies with an unmarried woman who lives in reputation, and is not suspected to be a common prostitute. Violence, however, did certainly, in some cases, make an ingredient in the offence of *Stuprum*, so that it seems a word of various significations. Its meaning has been frequently disputed by the interpreters of college statutes.

do not, they annex penalties ^{to} the parties, or to the priest celebrating the nuptials (39).

(39) I think it unnecessary to insert an account of these penalties, as existing in England; they being so generally known. The law of Ireland is now become interesting to the english lawyer, and is less promulged.

The penalties there, as to clandestine marriages, are principally to be found either in the canons, where they relate chiefly to the minister celebrating them without banns or licence, and subject him to deprivation if beneficed; degradation if not; or in the act 6th Anne, ch. 16, which, where the husband's father has fifty pounds a year in lands, or five hundred pounds personal estate, and by subtle means the marriage is procured, or the party being under twenty-one, contracts matrimony without the requisite consents, disables the wife from recovering dower, thirds, or jointure, subjects all accessaries to three years imprisonment, and makes the person celebrating the marriage, if a beneficed clergyman, liable to deprivation; if not, to transportation.

Our irish laws respecting marriages illicit, for reasons of state, relate principally to those between papists and protestants, and their variations require some attention; it is no longer necessary to enumerate them all, but the principal were the following; by 9 W. III. ch. 28, marriage by a clergyman of a woman protestant, having freehold or leasehold estates, or in personal property five hundred pounds; to any person without certificate of his being a protestant, subjected the clergyman to fine and imprisonment, but the marriage was not void.

By 12 Geo. I. popish priest or degraded clergyman, or layman, marrying two protestants, or a protestant to a papist, guilty of felony without benefit of clergy.

By 19 Geo. II. all marriages between protestants and papists, or between two protestants, celebrated by a popish

The civil law permitted the *proxenetæ*, or match makers, to receive a reward for their pains, C. 5. 1. 6 (40).

All restraints on marriage were held void by the civil law, and so they are by our ecclesiastical courts, the rule being there also, *maritagium debet esse liberum*, vid. 3 P. Wm. p. 239. Wrotesley v. Bendish (41).

priest, are *ipso facto* void. Upon this clause disputes have formerly arisen, whether it avoided all marriages between protestant and papist, or only those celebrated by a popish priest. If it did not invalidate all such marriages, I know of no other law that did. It is now only a question of curiosity, but the sense of the legislature upon it is sufficiently evident, by their thinking the act of 32 Geo. III. necessary.

But the law in these respects is almost entirely altered by the statute 32 Geo. III. ch. 21, which repeals the above act of the 9th of William, and authorises the intermarriages of protestants and catholics, provided they be celebrated by a clergyman of the established church; and by 33 Geo. III. ch. 21, a popish priest may marry protestants, or protestant and papist, if they have been previously married by a protestant clergyman, otherwise the marriage is void, and the priest subject to a penalty of five hundred pounds.

(40) Marriage brokerage bonds, and agreements to reward persons procuring a marriage, are entirely forbidden with us, and vacated by courts of equity.

(41) A condition in restraint of marriage prevails, *e.g.* a conditional legacy is forfeited if there be a devise over to another person, in failure of condition; but even so, our courts of equity have uniformly leaned against these re-

We must not conclude this chapter without observing, that besides the honours and rewards annexed to marriage at Rome, such as the *jus trium liberorum*, which conveyed various privileges and exemptions, the laws actually compelled marriage by punishing celibacy with fine, and it was a branch of the censor's office to put it in execution; on the same principle, a parent could not disinherit a daughter for incontinence, for whom he did not provide a husband before twenty-five; even the childless lost one-half of a legacy bequeathed, the other escheating to the exchequer. But, in later times, the privileges attending the parent of three children were, by a benign fiction, extended to others.

It must also be noted, that the man who had not a wife might lawfully have a concubine, but not both together. The popes of old authorised concubines; and it appears by our legatine constitutions they were usual with the clergy.

A concubine does not mean in the civil law a harlot; the concubine was a person taken to co-

straints, and anxiously endeavoured to construe them as meant only *in terrorem*, or to find out some virtual compliance; and if the condition be consent, that consent, if denied without reason, is not regarded. Devises over are, however, sometimes considered in the light of a forfeiture, nor has the party, when it is a forfeiture, any cause to complain, if already well provided for by the same will; and, therefore, if it be in such a case a condition precedent to a marriage, it cannot be got over.

habit in the manner, and under the character, of a wife, but without being authorized thereto by a legal marriage. Concubinage was confined to a single person—was of perpetual obligation as much as marriage itself—was a society recognized by the laws, and, in general, entered into between persons who, by laws of policy, were forbidden by the state to marry together for want of quality or fortune—the concubine might even be accused of adultery. These characters shew how widely mistaken we should be, if we annexed the idea of immodesty and contempt to the name of concubine among the ancients, as we do in modern times.

CHAPTER II.

HUSBAND AND WIFE CONTINUED.

HAVING treated in the last chapter of the method by which marriages were formed among the Romans, I proceed to consider their legal consequences, and afterwards the ways in which this connection might be dissolved.

As to their legal consequences, we shall find many instances of diversity between the roman law and ours. One grand distinctive principle between the two laws on this subject is, that by theirs, husband and wife were considered as distinct persons, who might have separate estates, contracts, debts, and injuries, whereas ours treats them only as one; such is their supposed union. On this principle rests great part of the variations on this head, between the two codes.

Hence, in the first place, they might grant to and contract with each other, upon valuable consideration, a privilege unknown among us; but gifts between them, without consideration, were invalid, lest affection should be made the dupe of art, and excessive fondness the instrument of

ruinous donation (1). On the same principle they might sue each other, as they are allowed to do in those of our courts which have chiefly retained in view the imperial constitutions, viz. the courts of equity (2) and ecclesiastical. This liberty, however, was so far restrained at Rome, that the husband could not have an action against the wife, implying infamy or turpitude. If a divorce indeed took place, she might be convened for goods previously by her taken, in an action *rerum amotarum*, and if she stole his goods after a divorce, she was liable to an action of theft (3).

From this power of contracting in the wife, the mischiefs which might be apprehended were obviated by rendering her contracts inoperative upon the husband, as fully as his were upon her; as they were separate persons, they were unconnected in their agreements with others, and the wife might sue and be sued without her husband,

(1) Gifts between husband and wife among us, are often supported in equity, though the law does not allow the property to pass, Fonblanque, vol. i. p. 94. He may give by the intervention of trustees and by will. 1 Blackstone.

(2) Vid. among many others, Brooks and Brooks, Pre. Ch. 24. Moore v. lady Moore. 1 Atk. 272. Oxenden and Oxenden, 293.

(3) The phrase of convening, and the expression an *action of theft*, so novel to the student of common law, will be explained in the sequel.

as she may now in our ecclesiastical courts (4). The fourth book of the code expressly declares, that the husband shall not be bound by the wife's debts or contracts, and gives the reason, *nam neminem alterius contractu obligari, certissimum est*. The husband was indeed obliged to maintain the wife, even though he married her without a wedding portion; but this obligation, if violated, only gave her a right to sue him for alimony, but did not make him liable to her debts (4).

As the husband was not answerable for the wife's debts, so neither was he for the injuries by her committed, nor is he with us, for the union in the English law is merely a civil union, they do not make one person when considered in a criminal light; with this exception, that with respect to some inferior offences she is screened by him, on the supposition of being under constraint; and as here husband and wife join in actions for injuries done to her, so at Rome he was to defend her from injuries, and might prosecute the author of her wrongs.

It might be supposed that husband and wife being thus separate persons, might be witnesses

(4) With respect to the effects of his debts upon her estates, or his power over her estates, that part of the subject will be found in its proper place, under the head of Title by Marriage, in the second book, which treats of Rights to Things.

for or against each other. They could not (5) ; which seems to confirm the opinion of Dr. Christian, in opposition to Judge Blackstone, that supposed union of person is not the principal ground of this prohibition, but the want of indifference naturally to be expected. The Roman law so far apprehended the partiality of affection, and respected the peace of families, as to refuse the reciprocal evidence of father and son, and brother and sister ; and in France, Domat informs us, that the depositions of kindred were rejected, as far as the children of cousin Germans.

It remains only to consider, among the personal effects of marriage, the power of the husband over the wife's person ; in this respect the civil law did not materially differ from ours, at least in later times (6), both allowed the husband (however harsh such powers may now appear, and however justly forgotten in polite life and refined society) to correct the wife with moderation ; the civil law indeed was less attentive to this moderation than ours, since it allowed, in some cases, *flagellis & fustibus acriter uxorem verberare* ; but still there was a limit, and a certain degree of cruelty enabled her to

(5) See Wood, 315.

(6) For in earlier it gave the husband a power of life and death over the wife, for grievous crimes, as well as over the children, Dion. Halyc. Plin. Nat. Hist. 14 B.

obtain a separate maintenance, or even a divorce; there are some vestiges of old severity under the emperors, vid. Suetonius, Tiberii vita. Tac. Ann. 2. 13. 32. It must be observed, that if the wife had not been emancipated by her father, she remained in the father's power, not in the husband's, though not so far as to give her a full power over her property by her father's consent only, without that of the husband; she took the husband's name as daughters did their father's, whence in inscriptions, *Antonia Drusi*.

DIVORCE.

I come now to consider how marriage may be dissolved, and this is either by death or divorce (7).

(7) Whoever compares the text above with the following note, will see how much better this matter has been regulated among modern christian nations, and how differently from that loose union amongst the Romans, which might be dissolved so easily, and upon such trifling occasions; in the first place, even when among us there is reason for a separation, it does not follow that there should be a total separation, a partial may answer the purpose, which we call *a mensa et thoro*, from bed and board. This does not give the parties liberty to marry, nor does it bastardise the children begotten before the divorce, and the parties may live together again if they please.

A divorce *a vinculo matrimonii*, has all these effects, if made on account of canonical impediments by the spiritual court.

Plutarch, in his life of Romulus, tells us, that he permitted an option of divorce to men,

The causes of divorce, a *mensa & thoro*, are very various, such as cruelty, intolerable ill temper, and so forth. But the causes for which the spiritual court can dissolve the marriage a *vinculo*, must be such as are either grounded upon the express words of the divine law, or plainly derive their origin from that source, such as consanguinity, affinity, and certain corporeal infirmities—for these causes the marriage is voidable, not void without sentence; and to avoid it, there must be a sentence of nullity, declaring it to have been void. This can only be obtained during the life of the parties, because it is *pro salute animarum*. Even adultery, though the only cause of divorce assigned in the New Testament, is not in the spiritual courts a cause of divorce a *vinculo*, but only a *mensa & thoro*. To obtain a divorce a *vinculo* then, an act of parliament must be had, and this is usually granted only in cases of adultery on the part of the woman; but of late years, some shameful causes having been brought to light, where it appeared that the parties wished to be parted a *vinculo*, in order to marry again, and therefore had by consent laid a scheme that the woman should be detected with the adulterer, and perhaps only with a sham paramour, parliament has leaned a little against such acts, and refused them in several cases where circumstances were suspicious; and lord Thurlow has been particularly active in setting his face against such contrivances.

The same thing would happen as to divorces in the spiritual courts, if the sole confession of the parties were to be admitted, even though upon oath; of this we have an instance in Mod. Rep. 2. p. 315. The husband and wife agreed that a libel should be given in against

but not to women; there must however be a cause, as adultery, attempt to poison, &c. per-

him, that he had before married her sister, and they procured the sister to come in and confess this. This prohibition against receiving the sole confession of parties, is found in the canon law, and is expressly inserted in the canons of our church; for in old times, separations were made among us on this confession, and were then very numerous and frequent.

If the marriage be originally void, there seems to be no occasion for a sentence of separation; and in that case the wife is barred of dower, the issue is illegitimate, and the persons may marry again: thus, for example, in the case of bigamy, Cro. Eliz. 857. Debt upon an obligation; defendant pleaded, that at the time of making the bond, she was wife to a person therein named. The plaintiff shewed, that that person had a wife alive at the time he married defendant, and there had been a declaratory sentence in the spiritual court. Judgment for the plaintiff, and said there was no occasion for such declaratory sentence.

If the marriage be voidable for canonical impediments, then after sentence the effects are the same as if it was void *ab initio*.

Effects of divorce a mensa & thoro.

This does not bar the wife of dower, nor bastardise the children, nor prevent the husband from enjoying her property, or whatever may come to her; but he must allow her alimony; where indeed the divorce is for her own crimes, the court, at their direction, refuse her alimony; and if she elope, and live with the adulterer, she loses dower. In the year 1554, Burnet mentions a petition of the clergy in convocation to the upper house, that in divorces which are made from bed and board, provisions may be made that the innocent woman may enjoy

haps drunkenness; for we find from Dion. Hal. &c. that the husband could severely punish this

such lands and goods as were her's before the marriage, or that happened to come to her use at any time during the marriage; and that it may not be lawful for the husband, being for his offence divorced from the said woman, to intermeddle himself with the said lands or goods, unless the wife be to him reconciled. But we do not find any consequence of this petition.

The children born after a divorce, *a mensa et thoro*, during such separation, are bastards, 1 Salk. 123. for a due obedience to the sentence shall be intended, unless the contrary be showed. But if *baron and feme*, without sentence, part and live separate, the children shall be taken to be legitimate, and so deemed till the contrary be proved, for access shall be intended until the contrary is shewn.

The canons direct, that in all sentences of divorce, *a mensa et thoro*, there shall be a caution and restraint inserted in the body of said sentence, that the parties so separated shall live continently, and that they shall not, during each others lives, contract matrimony with other persons, and no sentence is to be pronounced till the parties give security to obey this restraint. At a time when a reformation of the laws was intended, this sort of divorce was designed to have been taken away, and the book called *Reformatio Legum*, which is a sketch of some part of what was proposed, condemns this species of divorce very severely, as *constitutio a sacris literis aliena*. Reform Leg. 28, 6.

Even though the husband has been divorced *a mensa et thoro*, on account of the incontinency of the wife, yet he cannot marry again during her life. Mo. 683. yet by the law of Heaven he might—Whosoever shall put away his

offence, after having laid the case before her relations. The twelve tables allowed divorce, but not without good cause. Yet, notwithstanding this permission, there was no instance of divorce at Rome, till the year U. C. about 500, when Spurius Carvilius Ruga parted with his wife for sterility; but afterwards they became beyond measure frequent. Wives were dismissed, not only for want of chastity, or for intolerable temper, but for the slightest causes.

Paulus Æmilius dismissed his wife, assigning this general vague cause, that she injured him. Sulpicius Gallus, because his wife went abroad bareheaded. Sempronius Sophus, because she had gone to a public spectacle without his knowledge; and even Cicero Publilia, because she seemed to rejoice at Tullia's death. The famous instance of Cæsar sending away Pompeia, because Cæsar's wife should not even be suspected, is in every one's mouth.

wife, *except it be for fornication*, and marry another, committeth adultery. Matt. xix. 9. and the *reformatio legum* would have allowed another marriage, when the divorce was for such cause, unless both parties were guilty, and this is the doctrine of the canon law. Extra. lib. 4. tit. 19. c. 5. t. 16. Upon this principle, some acts of parliament for the divorce of parties on account of adultery, have expressly allowed the innocent persons to marry again. Acts of parliament have never been made to divorce *a vinculo*, except for adultery.

Recrimination, supported by proof, is a bar to divorce in the spiritual courts for adultery.

In later times, wives had a licence of divorce at their pleasure, and practised it abundantly, on slight or no causes.

In Cicero's Epistles, Coelius writes to Cicero, *Paulla Valleria soror Triarii, divortium sine causa, quo die vir e provincia venturus fuerat fecit. Nuptura est D. Bruto.*

Divorces were made with certain solemnities, and these solemnities corresponded to the respective modes of marriage; if the parties had been united by confarreation, they were separated by diffarreation. It is not clear what were the ceremonies received upon this occasion, except that we know that this, as well as confarreation, was a species of sacrifice, and that a corn cake was made use of in both. Plutarch mentions this mode of divorce, and from him we learn, that it was attended with some horrid and ill omened rites.

He speaks of the divorce of a *flamen dialis*, who was always, *I believe*, married by confarreation. Those who were married by coemption, were divorced by remancipation; as the form of marriage was to buy, so the form of divorce was to set free, or to make over to another. By this form of divorce, Cato of Utica espoused his wife Marcia to Hortensius, a remarkable fact mentioned by Plutarch; as the fiction was that he bought her, he might sell her to another by fiction. Thus we find from Dio. that Tib. Nero gave his wife Livja, even while pregnant, to

Augustus ; in the same manner that a father was used to give his daughter. If a wife was obtained by use, she had it in her power to divorce herself, by being absent from her husband three nights before the end of the year. The very absence constituted a divorce. In later times, the ceremonies of divorce were few and very simple. Breaking the *tabulæ dotales*, as appears from Tacitus, Ann. 11. 30. depriving her of the keys, which were always delivered to her among the forms of marriage, and sending her a message in a certain form of words, both verbally and in writing, intimating the intention to separate, was sufficient.

Augustus, who wished to put some checks in the way of divorces, directed that there must be seven witnesses to the divorce, all roman citizens, and adult, otherwise it was invalid. After the empire became christian, it might be supposed that divorce could not have been so easy; yet the contrary seems to have been the case.—See Erskine's Institutes, p. 73; and Novel. 140. p. 1.

The effects of divorce were, of course, with respect to the person, liberty to marry again, and a total freedom from the former husband's power. I do not find that the Romans were acquainted with that partial species of divorce, called with us a *mensa et thoro*. But if she was divorced on account of her own misbehaviour, or bad morals, the husband gained all her dowry. Hence it became a practice to marry women of known bad conduct, in order to have an opportunity of pro-

ving it, and thereby gaining the dowry. An example of such a man, viz. C. Titinnius, of Minturnæ, is mentioned by Plutarch, in his Life of Marius. If the divorce was for his own fault, she or her father got back her dowry. *Dowry*, in the civil law, always *meant* the portion brought *by* the wife; a very different signification from dower with us.

Hitherto we have spoken of divorces at the will of one party; but if both consented, there seems to have been no difficulty; and in that case the wife not only took back her dowry, but also carried away all the gifts and presents made by the husband.

Divorce is only between persons actually married. But there was also a mode of separating persons only espoused, and this was called, not *divortium*, but *repudium*. Here there was no occasion for any particular cause; whim was sufficient; no action lay for this change of will; and the only form was, sending this message, *Tua conditione non utor*.

A comparison of this law with ours has been carried on in the notes, and completes our observations on the subject of marriage, the law of which, however, is so extensive, that some things must necessarily have been omitted; and, among other topics, I may be blamed, perhaps, for not here touching on two not unimportant: the effects of statute laws on contracts of marriage abroad, and the effects of a sentence in the eccle-

fiastical courts; but it must be recollected, that these belong to other and more general heads (8). I shall, therefore, only here observe, that great doubts have arisen how far an act of parliament affecting marriage can be evaded by going abroad, or affected by the *lex loci*.

This was particularly agitated with respect to scotch marriages. Mr. Hargrave, as has been already observed, says the point *seems* fully settled in favour of scotch marriages by a late decision of the court of arches, afterwards confirmed by the delegates.

Whether this decision went upon the marriage act being construed to be confined to England, we are not informed; but certainly there would be a material difference between an act purporting to affect his majesty's subjects in all quarters of the globe, and an act confined to the country in which it was made.

I can with difficulty reconcile myself to the idea of a man leaving England to go to Scotland, or Ireland to go to the Isle of Man, to evade and defy a law made purposely to affect him; and it is observable, that Mr. Hargrave goes on to say—
 “ However, it may not be amiss to recollect that
 “ there have been persons of authority, particu-
 “ larly Huberus, a much-esteemed writer, who will
 “ not allow such cases of apparent evasion of the
 “ law of any country.”

(8) The first to general principles regulating foreign contracts, the other to the head of courts ecclesiastical.

The whole matter then stands thus:

By the general rule the *lex loci* prevails.

Huberus excepts these cases of evasion.

Lord Mansfield doubted whether scotch marriages were not within this exception.

The case of *Compton v. Bearcroft* says they are not.

The case of *Ilderton v. Ilderton*, says, that a marriage in Scotland between persons *who do not* go there for the purpose of evading the laws of England, will entitle the woman to dower in England (9).

If the decision in *Compton v. Bearcroft* be the law, it remains to be known, whether it went on the *wording* of the marriage act, or on a general principle.

On all these circumstances the jurist must form his opinion on the question, which I will state here in the words of Mr. Hargrave: "Whether the "*lex loci* ought to be applied to cases accompanied with circumstances so strongly marking "*an intent to evade the law of the country, to "*which the parties belong?"

But I must still distinguish an act such as that in Ireland of 9 Geo. II. ch. 11. attaching on the fact of marriage generally wherever it happen, and an act like the marriage act of England, confined in its words to that country (10).

(9) 2 Hen. Blackstone, 145.

(10) Sir James Marriott has spoken of Huberus, so respectfully mentioned by lord Mansfield and Mr. Hargrave,

A sentence of the ecclesiastical court, obtained in a suit in its nature definitive, and obtained without fraud or collusion, is conclusive evidence in any other court (11).

in his judgment on the ship *Columbia*, with the utmost contempt, as an ignorant dutch schoolmaster; and being of opinion that every marriage is a gain to the state and to true religion, commends that exposition which says, "If you stay at home, you shall conform to the ancient laws; but, if you will take the trouble to skip over the next ditch into another territory to be married, we will hold the marriage valid at your return." This is at least a merry mode of considering the subject.

(11) A common idea to the contrary has gone forth among men not of the legal profession, from the duchess of Kingston's case. But the sentence she offered in bar, was in a suit for jactitation, which suit is not definitive, and never passes in *rem judicatam*; it only shews that, for the present, the boaster has not proof, and enjoins him to silence, but with liberty to bring new proof whenever he can; and besides, the sentence appeared to have been obtained by collusion. But the lords never determined that a fair sentence in an ecclesiastical court on the same identical point, coming directly before it between the same parties, in a suit in its own nature definitive, was not conclusive, *e. g.* plea of coverture by a woman in a personal action, sentence of nullity is conclusive evidence against her.

CHAPTER III.

MASTER AND SERVANT.

IN treating of the rights of persons, the first relation which the Roman law offers to our view, is that of master and servant, or rather of master and slave; for, at Rome, servitude was in theory, and generally in practice the extreme of slavery. It is a melancholy consideration, that on the very threshold of this magnificent pile of jurisprudence, erected by a nation whose mighty boast was freedom, slavery should present itself in its most hideous form. Nor is it unworthy of reflection, that nations most attached to liberty, seem to consider it as a treasure confined to themselves, an inestimable blessing which they avariciously embezzle, and refuse its extension beyond their selfish limits.

Liberty and tyranny have kept pace with each other. The helots of Sparta, the slaves at Rome, the villeins of the feudal system, bear testimony to this melancholy truth. Sorry we must be to add to the number our native countries, which have fixed the model of rational liberty among nations; whose singular glory is the enjoyment of freedom, and which have, notwithstanding, in the colonies,

established a system of cruel slavery, perhaps beyond example in any other age or realm.

That no system of slavery can find a foundation in justice and reason, has been often demonstrated by the ablest writers. Its pretended justifications, set up by Justinian, of captivity, contract, and birth, will not stand the test of common sense. The rights of conquest have no such extent (1). Self-imposition of voluntary slavery is forbidden to man by the law of nature; and hereditary slavery cannot exist when the grounds of original servitude are taken away. But little will arguments of reason prevail with avarice and injustice: on men possessed of such passions, small will be the effect of painting the horrid cruelties which result from vesting unbounded power in weak, impotent, frail mortals. If a direct appeal to feeling does not succeed, argument and eloquence are useless on the subject, for they must be addressed to brutes.

Since, however, slavery has pretended to a ratification from law, I must proceed to my duty of unfolding the condition of slaves at Rome (for as to that of menial servants, or apprentices, antiquity has handed down to us so little on the subject, and slaves, as in our West Indies, seem so entirely to have supplied the deficiency of free servants, that it is not worth our pains to treat of them), nor will a comparison of the situation of the Roman slave, with that of the ancient villein and modern negro, be foreign to the subject.

(1) Vid. Locke on Government.

The Romans divided persons, in their most general discrimination of them, into freemen and slaves. Freemen, again, into such as were in their own power, *sui juris*, and such as were not; and, by another distinction, into such as had always been free, called *ingenui* (2), and such as had been made so, called, at various periods, sometimes *liberti*, and sometimes *libertini* (3).

Of slaves themselves the Romans did not reckon different orders, their reason for which requires some explanation, and will tend to throw light on some other parts of their law.

They considered persons, and they defined the meaning of the word to be, not only human creatures, but men considered in relation to some state, either natural, a state of nature, or civil; if civil, that state to which he was referred, was either of liberty, citizenship, or family (4). Now,

(2) An unjust or illegal servitude did not prevent a man from being *ingenuus*.

(3) In the earlier ages of the Republic, *libertinus* meant the son of a freed man; but afterwards, equally with *libertus*, it meant the freed man himself. When Horace says, *Libertino patre natum*, he means that his father, not his grandfather, was the freed man.

(4) Losing any one of these states or conditions was called *capitis diminutio*, and was either *maxima*, when all these three rights were lost—middle when only citizenship—least, when only those of the master of a family. The explanation of these terms is often requisite to the understanding of Latin authors.

as a slave was a stranger to liberty, could not be a citizen, and had not the rights of a master of a family, he was not allowed to be a person, but considered as a *thing*; and, consequently, the distinctions of persons into orders was not considered as having relation to him.

This quaint and pseudo philosophical idea, (for the Roman lawyers were extremely fond of borrowing from the sects, particularly from the stoics) did not exclude many real distinctions of slaves into temporary and perpetual, conditional and absolute, those who were attached to the soil, *adscriptitii glebæ*, (resembling a certain class in the French West India colonies) and those which were not.

I shall now consider how slavery was created; secondly, its effects; thirdly, how dissolved; and, in the notes, compare their law upon these heads, with the ancient English and modern West Indian codes.

SLAVERY, HOW CREATED.

First, by captivity.—Hence they said *servi* were *quasi servati*, & *mancipia quasi manucapti*; fanciful etymologies of the stoics, which they substituted for definitions. This pretended foundation of slavery, has been so successfully exploded by Locke, Blackstone, and many other writers, that it requires no new argument to expose its futility. Accordingly, among modern civilized nations,

captivity in war has produced no such effects, nor even in the wars of Mahometan princes among themselves. The English colonist in the West Indies, indeed, has not blushed, at supporting this assumed justification of slavery, in concord with the African barbarian from whom he purchases.

Secondly, By birth,—slaves were things, as we have observed, and, therefore, the child of the female slave was considered as belonging by accession to the master; and the rule was, with respect to slaves, *partus sequitur ventrem* (5), a maxim which prevails in all our West India colonies; whereas, among free persons, their law, as well as that of England, ordains that the child should follow the condition of his father, and, indeed, the law of England made the rule universal; therefore, in ancient times, if a bond woman or neife had married a free man, the issue was free; and at Rome, in favour of liberty, if the mother at the time of her conception, or delivery, or in the intermediate time between them, had been free even for a moment, the child was free.

Thirdly, by sale—from others or themselves, for persons of above twenty years of age might sell *themselves* to slavery, which no man can do by our laws; *i. e.* he cannot reduce himself to absolute slavery (5), though he may bind himself in certain

(5) By absolute slavery, I mean subjection to unlimited power over life and fortune. Captivity, birth, and sale, the usual origin of slaves in the West Indies.

articles of servitude for years, or for life, as do the indented servants, usually so called, who frequently thus get themselves conveyed to our plantations: the Jewish law permitted this practice.

Fourthly, By crimes,—but this, for the most part, was only for capital crimes. An exchange of punishment which of late years our laws have adopted in some measure by condemning criminals, though not to galleys, yet to working in the hulks, and near them. A measure, I own, repugnant to my judgment, and though it has been in our times admitted, yet, in former periods, so odious to the feelings and opinions of the English, that an attempt to introduce it in the reign of Edward VI. was so universally condemned and reprobated, as to be instantly quashed; however the resemblance of the state of these culprits to that of the Roman *servi pœnæ* is but remote, the latter losing the rights of marriage, of making wills, and almost all other privileges of man.

Fifthly, A few crimes or offences, less than capital, by which persons were reduced to slavery, as they were mere creatures of Roman positive and temporary laws, need barely be mentioned; these were frauds, to avoid the census, or muster roll, in order to escape the war levies or requisitions—not appearing at the end of a year, after having entered into recognizance in some court to appear—criminal intercourse between a free woman and slave, which reduced her to his condition—tried

and decided ingratitude by some proper tribunal in a freedman towards (6) his patron, which reduced him to his former state.

2. EFFECTS OF SLAVERY AT ROME.

Servants at Rome were things, therefore, the master had the same power over them as over things; could sell them, or give them away by donation or legacy; could put them to death, or punish them at pleasure; and whatever they acquired, they acquired not for themselves, but their masters. This immense power degenerated into barbarism, until, in later and more civilized times, laws were made to restrain unbounded ma-

(6) In England slavery existed among the Saxons, introduced, perhaps, by Danish tyranny, though the origin of it, or upon what foundation put, (probably, I think, conquest,) does not seem to be ascertained, and was reduced on the Norman conquest to the state called villenage; in our West Indies, the pretended foundation of slavery must generally be captivity, birth, or purchase from African vendors of captives, criminals, debtors, or hereditary slaves. That slavery cannot be created in England, or even exist, is universally known, since the determination in the case of Somerset the negro, in 1772; and the necessity of baptism to freedom, coupled with the notion that heathens could legally be enslaved, has long since been exploded. Kinds of slaves were, ordinary, or *adscripti glebæ*; so, villeins regardant, or in gross—slaves in the French West Indies, attached to the soil or not; but alas! no such distinction, I apprehend, in our colonies.

gisterial tyranny. Augustus began by directing the prefect of the city, to take care that no immoderate cruelty should be exercised upon slaves. In the reign of Claudius, a law was enacted, making the crime of killing a slave, homicide; a law apparently inefficacious, since, at a subsequent period, Juvenal Sat. v. l. 219, introduces a lady ordering her slave to be crucified: a remonstrance is made to her, that he is innocent; she makes the celebrated answer,

*Nil fecerit, esto,
Sic volo! sic jubeo! siet pro ratione voluntas.*

The Roman, indeed, seems to have been ingenious in inventing torments for his slave. *Stimuli, laminæ, cruces, compedes, nervi, catenæ, carceres, tortores, suspensa a pede centipondia*, are terms perpetually occurring in Latin authors (7).

(7) Let us now compare his condition with that of the Norman villein and Colonial negro. If among the Saxons, a slave's eye or teeth were beaten out by the master, the slave recovered his liberty; if he was killed, the master only paid a fine to the king. The villeins of the Norman æra were in a better situation, the lord was not allowed to maim, much less to kill them; it is true, that whatever the villein acquired belonged to his master, *e. g.* if he purchased land, and that he could not prosecute an action against his lord; but he might bring suit against all other persons, and even against his master; might have an appeal for his ancestor's death, and the chastity of the neice was protected from outrage, by giving her an appeal of rape.

Adrian repressed this torrent of horror, by something more than words; he banished several

It is matter of real lamentation, that the comparison of these conditions, with that of the slave in the West Indies, is plainly favourable to the former.

It is said, however, that the accounts of colonial cruelty have been much exaggerated, and much pains have been taken to combat the general conviction by assertion, and by evidence. To avoid such imputations, let us recur then to undisputed facts, acknowledged by clear, sensible, and well informed writers, acquainted with those regions, and long resident there. It does not seem to be disputed by them, that until within these few years, the power over life and limb, was either expressly given to the master, as well as that of whipping and beating without limit; or, at least, such exercises of authority were either overlooked, or slightly punished. In Barbadoes, the wanton and wilful murder of a negro is said to have received its compensation, by the payment of fifteen pounds sterling, into the public treasury: and in Jamaica, until the year 1792, a white man, whether proprietor or not, who had killed a negro, or by an act of severity been the cause of his death, was for the first offence entitled to benefit of clergy, and not liable to capital punishment unless he repeated his crime.

That dreadful and unmerciful scourgings were inflicted will not be denied, and all that Mr. Edwards, the ablest advocate for the colonies, has said is, that they have not been frequent. 'The narratives,' says he, 'of excessive whippings, and barbarous mutilations, shall not be asserted by me, as they have been by others, to be all of them absolutely false. Though they have happened but seldom,' he adds, 'they have happened too often.' That the power does exist has been acknowledged, and let me ask the heart of man, when not swollen by inordinate vanity, whether such power

persons, who, upon slight causes, had treated their slaves with cruelty. Antoninus Pius extended

can exist without abuse—let the mildest native in these climes recollect the temporary passion produced by the offences of menial servants, attended, perhaps, with circumstances of real and considerable provocation, and ask whether, at the instant, his reason could always be confided in as the guardian of his anger. The heart of man is deceitful above all things, and imposes upon its owner. I do not charge the West India planter with being naturally bad, nor deny his being in many cases a good and beneficent master. Even those who are otherwise may, perhaps, often be the victims of habit and usage, overcoming a good disposition. Caligula, had he been a subject under a well regulated government, might possibly have exhibited a tolerable character. I mean only, that unlimited power is suited to none but the Allwise and all Good Creator of the Universe, and generally in the breasts of frail mortals exterminates humanity; he who supposes himself able to wield such a sceptre, while he thinks he standeth, should take heed, lest he fall.

But departing from arguments founded in the nature of things and man, let us consider the facts implied by the famous consolidated act passed in Jamaica in 1792, the boast of colonial philanthropy. That act prohibits arbitrary and unlimited punishments—makes the murder of a negro a capital crime in the first instance; forbids the loading them with iron chains, collars, or weights, except when necessary for securing the person of the slave; punishes with fine and imprisonment his mutilation, and, in certain cases, imparts freedom to the injured, allows them certain holidays, gives them one day in a fortnight, exclusive of Sundays, to cultivate their own provision grounds, with many other humane provisions, some of which I am ready to admit, had been before received by law or custom, yet the general view

the penalties of the Cornelian law made against assassins, to those who should kill their slaves with-

of that act will prove to the investigator the cruelty of antecedent practice, by the necessity of its novel regulations; and notwithstanding its salutary effects, the following hardships, which still exist, sufficiently shew the miserable state of the subjected African.

First, It is acknowledged and lamented by Mr. Edwards, that the evidence of a slave cannot be admitted against a white person, even in cases of the most atrocious injury. What then import laws made to punish tyranny, if the tyrant, by removal of all white witnesses, may with impunity exercise his cruelties upon, and in presence of the blacks.

Secondly, In our colonies they are not attached to the soil; in the French they were: hence the repentment of the master can tear the wretch who offends him from the embrace of his wife and family, and sell him again to be transported by some new master, perhaps to the mines of Mexico; and the same consequence may follow from the imprudence of a spendthrift owner, whose slaves are dragged to public auction by a sheriff's officer. This practice, sanctioned by a British statute, is also marked and reprobated by Mr. Edwards himself.

Thirdly, The consolidated act is peculiar to the island of Jamaica, where, as well as in Grenada, the condition of slaves was always more tolerable than in the other islands; but to give energy and effect to that act, some public officer is wanting, OBLIGED to defend the rights of the negroes. Councils of protection have, indeed, been appointed, but they never can afford such prompt assistance as an individual attorney, who has no other employment. In this respect, therefore, the French colonies have the advantage. Their slaves are attached to the soil, their *Code Noir* is much more forcible than a colonial act, such as the consolidated law of

out just cause, which just cause seems to have been, finding him in a plot against his master's life, or in adultery with his consort; and a law in the code gave the slave a remedy, if he was intolerably punished by his master; so, that in the later periods of the Roman Empire, his condition was ameliorated in a very considerable degree.

OF DISSOLVING SLAVERY, OR MANUMISSION.

Census, Testamentum, Vindicta, were the ancient methods, and the solemn ones. The first was by enrolling the slave's name in the censor's rolls, by order of the master.

This method was out of use in Justinian's time, and even from Vespasian's. Constantine, in the room of it, introduced manumission in church. It was usually done at Easter in a public manner, and the act registered. The method by will requires no explanation.

Jamaica, and a king's attorney was bound to prosecute wherever he heard of abuses. I am sorry to add, that much more pains were taken in giving the slaves a certain degree of religious knowledge, than among our countrymen, which, however, is attended to in the above-mentioned law of Jamaica. How far the French revolution may have improved, or vitiated this comparative picture, I am not prepared to say; but, on the whole, I think enough has appeared to shew, that the preceding observations contain something more than mere declamation.

Vindicta: The master twirled the servant round, declared him free, and with a blow dismissed him; whence Persius, Sat. 5. l. 75. *Heu! steriles veri, quibus una Quiritem Vertigo facit.* This was done in the presence of the prætor, whose lictor with his wand, called *Vindicta*, tapped the slave on the head, who then was free; his name was then enrolled in the list of free men, his head was shaved, and the cap of liberty put on it. Hence, I suppose, we paint liberty with a wand, and a cap at the end of it.

Less solemn methods of manumission were by letter, or writing; to which, however, Justinian required the subscription of five witnesses.

Inter Amicos, i. e. by parol, calling together five friends to witness it.

Per Convivium, Where the slave was admitted to the master's table, it made him free: for it was indecorous for a master to sit down with a slave.

By nomination, When the master called the slave son; this mere appellation did not entitle him to the right of an adopted child, but made him free. There were many other of these less solemn modes of manumitting. Hein. p. 20.

Of persons manumitted, at first there were no degrees, all were in equal condition. Afterwards, two remarkable laws were made, *Ælia Sentia*, & *Junia Norbana*, occasioned by the improper and guilty villainous persons who had been often manumitted, and thereby obtained the rights of Roman citizens. By the first, persons manumitted

were put only in the condition of the *Dedititii*, i. e. of those people who had surrendered unconditionally to victorious Rome. The latter gave to persons manumitted by the less solemn rites, not coming within the former law, the rights not of Roman citizens, but of the Latin colonists.

Hence, three species of freed men; the first, Roman citizens; the second called *Latini Juniani*; the third, *Dedititii*. The first had the full rights of marriage, could make wills, enter into contracts. The second could not make wills, nor had the rights of marriage; but could, in some measure, enter into contracts. The third had none of these rights, nor any chance of improving their condition.

Justinian took away these distinctions, and retained only this difference between the *Ingenui* and *Libertini*, that while he admitted the latter to the gold ring, the former monopolized the right of patronship. There were restraints also laid on masters, to prevent improper manumissions. No man could manumit to the prejudice of his creditors, nor could persons under twenty years of age manumit, unless under certain conditions, viz. that it should be done by the mode of the wand, in the presence of a number of respectable citizens, as before mentioned, and for just cause. These just causes were, if a minor under that age manumitted his relation, his pedagogue, his nurse, or his servant, of seventeen, to be his agent; or

his maid in order to marry her. This age of twenty, Justinian changed to seventeen.

If manumissions had been imprudently made by living persons, and required the two laws above mentioned, it is natural to suppose, that they were with more frequent imprudence made by will, to prevent which, the law *Fusa Caninia* was made.

I should beg pardon for such a nomenclature of the names of the laws, but those which I do mention occur so frequently in the Justinian code, that it is impossible to understand it without knowing a little their names and subjects.

Modern manumissions have been made by parol, or deed of enfranchisement.

CHAPTER IV.

FATHER AND SON.

THE student of the laws of England may probably ask, in what respect the subject of the present lecture can be worthy of his attention, or how admit comparison with our municipal constitutions. It is true, the nature and extent of the paternal power at Rome, totally varied from its essence and limits among us, and its sources were there multiplied, as it originated not only in marriage, (its only basis amongst us) but also in legitimization and adoption. But little as it might be expected, its extent has become the foundation of argument and reasoning in our courts, even in this century, and particularly in one celebrated cause (1). And the doctrine of legitimization, merits some attention, not only

(1) I mean that respecting the right of educating the children of the heir apparent to the throne, disputed between King Geo. I. and his son, then Prince of Wales, on which occasion the right of the grandfather to take care of their education, in preference to the father, was *endeavoured* to be supported on the rules of the civil law, as transposed into their own writings, by our Bracton and Fleta. See Fortescue's Reports.

as having been attempted in early times to be intruded upon us, but also as actually being the law in our neighbouring kingdom of Scotland: and the propriety of both this and adoption, is surely a subject worthy of controversy, and inviting to curiosity.

We shall consider,

I. The origin of the paternal power.

II. Its extent.

III. The mutual duties of father and son.

IV. How it was dissolved.

The paternal power was acquired by marriage, and birth of children in lawful wedlock.

Secondly, by legitimation.

Thirdly, by adoption.

Of marriage we have treated.

LEGITIMATION.

Legitimation was first introduced by Constantine. Of this there were five modes.

The first was by a subsequent marriage, which rule is followed by the canon law, but rejected by ours (2). The civil law, however, only al-

(2) Of this rejection made so famous by the stern and steady answer of the barons to the proposal of this rule, we are to find the causes, not in dislike to the particular doctrine, but in general aversion to the introduction of the civil law. The clergy brought it forward in *limine*, as knowing it to be the most palatable and inviting to the barons, who had great numbers of illegitimate children, but

lowed subsequent marriage with a concubine, to legitimate the children; the canon with any one.

The second mode was by imperial rescript. This was introduced by Justinian, because the preceding in some cases could not be used; for instance, where a concubine was dead, or for any other reason, could not be taken to wife.

Thirdly, will. This was not so much a mode of legitimation, as a testamentary declaration, that children were originally legitimate.

Fourth mode, By arrogation (a species of adoption more particularly to be explained in the sequel) for a man might adopt not only the children of another, but also his own illegitimate children.

Fifth mode, *Per dationem curiæ*. To explain this, we must know that the office of Decurion, as it was called at Rome, was an office of honor indeed, but of much labour and trouble, as well

these feudal lords saw the invidiousness of the proposal, and rejected a favourite measure because it might tend to the general introduction of the civil law, so favourable in their opinion to the increase of the powers they dreaded, those of the crown and the clergy.

Judge Blackstone has supposed many weighty reasons besides, which might have swayed the barons, and which in his opinion condemn this rule of the civil and of the Scotch law; but is there not much cruelty in refusing a power to the parent to make reparation to his injured offspring, and in enabling a younger son thus enriched to brand his indigent elder brother with the name of bastard.

as of expence in giving public spectacles, &c. The *Datio Curiae* was making men subject to this office; in consequence they could not reside out of their town or borough, but were, as may be said, slaves of their little *Curia* or senate, in their *municipium*. *Curiae adscribebantur, ei inferviebant periculo suarum facultatum*; it is no wonder that men were not ambitious of such splendid slavery, and must be enticed to it by such rewards as legitimation.

It must not, however, be conceived that legitimation was always a benefit; the effect of legitimation was undoubtedly, at least in the case of a subsequent marriage, a right of succession to paternal property, but as it also reduced the subject of it under the paternal power, it might possibly, as will be more fully seen hereafter, also operate as a disadvantage, and therefore persons could not be legitimated without their own consent.

Illegitimate children were of four kinds.

First, those born of a concubine, widow, or virgin *Stuprata*, called *natural children* or *Nothi*.

Secondly, the children of a harlot, called *spurious*, or *vulgo quæsti*.

Thirdly, children of an adulteress.

Fourthly, children of an incestuous marriage.

The first order only, viz. natural children could be legitimated, for legitimation implies the fiction at least of a marriage; and in the second case there was confessedly no marriage; in

the third and fourth there could not be one by law.

Illegitimate children were not under the paternal power, but they were not infamous; the natural were capable of holding any honors; the spurious were undoubtedly by the people somewhat contemned, but not rendered infamous by the laws (3).

ADOPTION (4).

This remarkable custom, (which my Lord Coke says was never introduced into England) was

(3) The spurious did not bear a father's name, the father being uncertain. Cæsar's son by Cleopatra, formed an extraordinary exception, for which Anthony reproached him. S. P. F. in Roman inscriptions, sometimes means *Sine Patre Filius*. The civil law as well as ours, empowered the confinement of the pregnant widow, to prevent supposititious births, and the rule we have formerly mentioned forbidding a second marriage within a year from the death of a former husband, *infra annum luctus*, was made to prevent disputes about the real father; this latter rule also prevailed in England until the end of the Danish government. If husband not heard of, woman might marry again after five years, till Justinian required positive proof of his death; with us seven years save the felony.

(4) It is not unusual we all know, even among us, for friendship to adopt in effect, the children of strangers in blood; but here is the plain difference, between such acts of friendship, and the legal adoption of the Romans; the friend and intended benefactor may change his mind when

not unknown to the Greeks, ^{as also} to the Assyrians, Egyptians and Hebrews. ¹¹⁰³ A

The feelings of mankind naturally suggested this resource of orbity, and declining, unsupported age looked abroad for that staff which was denied to it at home, but its uncommon and extraordinary prevalence at Rome requires some further investigation of its peculiar causes in that state. First, it was thought disgraceful not to keep up and preserve the domestic gods, and sacred things of the family. Secondly, the rewards offered to the fathers of families, and the penalties on orbity, made men eager for children, and adopted children answered the purpose. Thus the candidates for honors adopted sons, in order to have the *jus trium liberorum*, though very often as soon as they had obtained those honors, they got rid of these fictitious children, by emancipating them, until this trick was stopped by a decree of the senate, mentioned by Tacitus.

Thirdly, a third reason for adoption was to get admission into the plebeian offices, *e. g.* the tribuneship, and this did Publius Clodius.

The persons to be adopted might either be persons in their own power, or persons already in the

he pleases, but the adopted child at Rome obtained by the adoption legal rights of inheritance and succession to the adoptor, of which he could not be arbitrarily or wantonly dispossessed.

power of another parent; in the former case it was Arrogation (5).

Who might adopt, or be adopted.—Those only who could have been parents, and have had children in their power could adopt, therefore eunuchs could not, nor infants, nor women, unless by special licence from the prince. Younger persons could not adopt their senior, but the adopter must have been eighteen years older than his adopted son—thirty-six than his adopted grandson; even if they were thus qualified, still they must have been persons who wanted this solace of old age, therefore if they were still capable of having children, (and all persons under sixty were supposed capable) or if they had already natural children, they were not intitled to this indulgence without particular licence. The consent both of the adopted child and of the natural father must be obtained: lastly, no man could adopt a grandson without the consent of his son, if he had one, for he was not to force an heir upon his son; nor could illegitimate children be adopted; so that adoption was much more limited in Rome, than is I believe generally imagined.

(5) They were therefore thus defined, *Adoptio, est actus solennis, quâ in locum filii vel nepotis, adsciscitur is, qui natura talis non est, vel adoptio est actus legis quâ liberos qui in potestate parentum sunt, adoptamus imperio magistratus.*

Arrogatio, est actus quo homo sui juris auctoritate summi imperantis, in patriam alterius potestatem redigitur.

Arrogation was still more so, for it was confined to adults, because the consent of the person arrogated was necessary. Antoninus Pius, indeed, permitted the arrogation of persons under the age of puberty, but not without the consent of relations, or of guardians, and an examination whether the arrogation was for the advantage of the minor. He added these further conditions, that if the arrogated died before puberty, his goods (6) should go in the same succession as if he had never been arrogated; and if his father emancipated him without cause, he was to restore to him all his property, and to bequeath to him moreover a fourth part of his own. Besides these restrictions, none but Roman citizens could arrogate, and that only at Rome: the tutor could not arrogate his pupil; and neither woman nor foreigner could be arrogated, but women might be adopted.

Form of adoption.—Adoption was done before a magistrate, but might be done any where: the rite of adoption consisted in three sales from the natural father to the adopter, *per æs et libram*, in the presence of the balance-holder, the antestatus and five witnesses, ceremonies much resembling those which attended the making of wills among the Romans (7). There was another mode of adop-

(6) Goods, *bona*, in the civil law, mean all a man's estates and property, not merely chattels, as with us.

(7) This form of adoption we find in Suetonius, when Augustus adopted Calus and Lucius.

tion, viz. by testament; but this could scarcely be called so in strictness, since it did not reduce the devisee under the power of the adopter; it was rather a conditional bequest of the inheritance, on condition of bearing the testator's family and name: hence, to acquire other rights, a regular adoption was necessary. Thus we find that Augustus, though adopted by Julius's will, took care to have it confirmed by a law; and Tiberius, though directed by will to bear Augustus's name, yet, after the death of Caius and Lucius Cæsar, was by Augustus regularly arrogated.

Form of arrogation.—Arrogation was a much more public act than adoption; it was always done in the *Comitia Curiata*, because it was considered as a matter concerning the people (8), and to be to them referred. The reasons of so considering it, and insisting upon its notoriety, were these: As the right of inheritance was to be transferred, it ought to be public, to prevent frauds upon lawful heirs; and besides, as the name of the person arrogated was struck out of the tables of the Census, and he reduced under the power of another, this was not to be done without the consent of the

Heineccius makes a question, whether solemn adoption would not to this day be valid in Germany? Something like adoption is frequent in that country, viz. the putting step-children on a par with own children by the decree of a magistrate.

(8) It derived its name from the *Rogatione ad populum lata*.

people. The pontifices took care that the person arrogated should not be imposed upon, or do any act to his disadvantage, and examined whether the arrogator was entitled to this privilege; this done, the votes of the people were taken. In later times the emperors took upon themselves, more especially as they were *pontifices maximi*, to arrogate by imperial rescript.

Effects of arrogation and adoption.—Both brought the party, until Justinian's time, under paternal power of their new father, gave a right to his name, to a participation of his sacred things and rites, and right of inheritance (9); but while the adopted child thus became entitled to the property of his assumed parent, he lost all claim to that of his natural father; he was also raised or depressed into the rank which his new father held (10). Justinian gave a mighty blow to adoption, by giving the adopted all the rights of sons, without the adoptor having the paternal power, unless he was a person in the ascending line, adopting a descendant, for it was not unusual for a grandfather to adopt a grandson.

(9) At least of succeeding to the *agnati*.

(10) Thus Livy mentions that Cornelius Cossus was elected Military Tribune with consular power, at a time when this office was not open to plebeians, which privilege he obtained by being adopted out of the Licinian, which was a Plebeian, into the Cornelian, a Patrician family.

Parental Power—Duties of Father and Son.

By the Twelve Tables, the father had a power of life and death over the son, of scourging, imprisonment, and sending in bonds to country labour, and, even if necessitated by hunger, of selling and mortgaging him (11); but this power was restrained by the Imperial Constitutions, and by custom and judicial interventions at earlier periods, and parents severely punished that put their children to death, no power being left to them but that of moderate correction, and disinheritance for *cause expressed*; and this paternal power did not cease with the minority of the son; he could not sue the father, nor any one else without the father's consent; no action lay against him while under the paternal power, but must be brought against the father; whatever he acquired,

(11) The power of a Roman father over his child was peculiar to that state. Dion. Halyc. has proved that the Greeks knew no such thing, at least not in the same degree, nor the Persians, though the latter exercised a very austere authority over their children. For a father's power by the Mosaic law, see Deuteronomy, ch. xxi. This power originated in a law of Romulus, though admitted into the Twelve Tables as an ancient custom; but all the laws of the kings which were retained, were retained as old customs, not as regal laws, *ex odio insigni regii nominis*; the father did not punish, however, without trial; it was in reality a domestic court,

he acquired to the father's advantage; there could be no civil obligation contracted between him and the father, for they were as one person; he could not marry without the father's consent, nor without his approbation make a *donatio mortis causa*, nor a will, even with his father's consent, except of such property as he got in the wars, called his *peculium castrense*; with respect to the father, they were considered as *things*, not as *persons*, but with respect to others as persons, herein differing from slaves, who were regarded as *things* in whatever light considered; as long as the law allowed him a power of selling them, he might do so three times, so that, if manumitted by the buyer, they would twice fall back into his hands, which is worthy of observation, because it accounts for some of the Roman forms of emancipation, &c. These extravagant powers could not have been congenial to an arbitrary monarchy, and accordingly we find them gradually diminished by the intervention of the emperors (12). There was no ma-

(12) Trajan emancipated a son that was cruelly treated by his father, and deprived the father of the son's property. Adrian banished a father who killed his son in the chace on suspicion of adultery. At length, by Valentinian, the power of trying the offence of a son was entirely transferred to the magistrate. Sons were put to death with impunity down to the time of Augustus.

Constantine permitted, on account of extreme poverty, to sell their children when just born; but he did this to prevent

ternal power, because she also was in the power of her husband (13): this power continued during the life of the son, and did not cease even on his arriving at the greatest honours, some very particular ones excepted, for which see Novels 81. ch. 1. such as the consular dignity, or being made a bishop; but while in public office, his duties to the public naturally abated and interrupted a little the father's authority: the father was bound to

their being exposed or murdered; and, to prevent the necessity, instituted poor laws.

With respect to childrens' acquisitions, the privilege of reserving whatever they gained by military service was at length extended to every adventitious gain of theirs, such as a bequest or a salary.

(13) The English and Irish laws give the father only a moderate power of correction and restraint until the age of twenty-one, which he may in part transfer to a tutor or schoolmaster. His duties to them are protection, education, and maintenance, until able to maintain themselves; when able to work, if the parent maintains them, that parent is entitled to the profits of their labours, but has no power over their estates (if they have any), further than as guardian or trustee, and must account for the property when they come of age. A mother is entitled to no power, but only to reverence and respect. In England, by the poor laws, peculiar obligations are imposed. The civil law did not oblige a father to maintain the offspring of an incestuous marriage, though it imposed the reciprocal duty on the child. The canon law and ours do not dissolve the parent's obligation in any case.

educate the son according to his ability, and to support and protect his children, and also his grandchildren. The child, if he had a separate property or peculium, was to support the father if necessary, and bail him if imprisoned, but was not otherwise obliged to pay his debts. A man was obliged by law also to relieve his poor brothers and sisters, but not more distant relations (14).

The paternal power was dissolved by the natural or civil death of the father, or by emancipation (15).

(14) A law much resembling that of China. Lord Macartney's Embassy, chap. 4. vol. 2.

(15) The civil death was by deportation, relegation, or becoming a slave of punishment, terms occurring sufficiently often in the classics to deserve distinction. Deportation was a perpetual banishment, depriving the banished of the rights of a citizen. Relegation might be perpetual or temporary, but did not destroy the rights of citizenship. The slaves of punishment were those condemned to the mines, or sentenced to be destroyed by wild beasts. The parent taken prisoner did not lose the parental power, it was only in suspense till his return: he who returned from captivity was supposed never to have been absent, by a fiction called *jus postliminii*. Relegation differed from exile, for the exile was deprived of the rights of citizenship: hence Ovid. Trist. 2. Ipse relegatus non exul dicor—see also Livy, lib. 4. ch. 4.—men were driven from their country by the interdiction of water and fire, for no man could *directly* be forced into exile, but only by the circuitous method of forbidding to him the necessaries of life. The French, in their ridiculous affectation of similarity to the Romans, have of late studiously used the terms of deportation, &c. &c.

Emancipation—a sound so pleasing to modern ears—did often at Rome convey a very different meaning: the child, though freed from the parental power, lost the right of succession to the parental estate; it was to him frequently a sound of woe and of disinheritor; he therefore could not be emancipated against his own consent, but for sufficient cause, nor refuse to be emancipated if the father shewed sufficient reasons. On the other hand, where emancipation was desirable, he could not force it, except for just cause, such as immoderate cruelty.

The party coveting it had to labour through not only his father's but his grandfather's chains. First, if the grandfather was living, the father and the son were in the power of the grandfather; and the father had not this special power over his own son, till the death of the grandfather, because the father himself was a dependant (16). The

(16) Upon doctrines like these were founded the positions in our ancient books, relied upon by the advocates for King George I. in the famous contest before-mentioned between his Majesty and the then Prince of Wales, about the education of the Prince's children.

The son of a daughter was not in the grandfather's power by the civil law; nor with us, says Co. L. 84. 6.

The court of chancery has often interfered with and controuled the parental power. Vide 2 Brown, Ch. Cas. and 4 Brown, ditto; so the courts of law by Habeas Corpus.

A child has been taken from a grandfather, and put under a mother's power. Mellish and Da Costa. 2 Atkyns, 14.

grandfather might even emancipate the son, and retain the grandson in subjection; and vice versa, his emancipated grandson would, upon his death, fall back under the father's dominion: such and so extensive was the slavery of children in that region of boasted liberty. Even marriage did not emancipate the daughter, though she owed her husband reverence, and was obliged to work for him. But to dwell longer on this obsolete subject would be as tedious as useless; I therefore omit a description of the form of emancipation, further observing only, that ten years nonusage made the son free, without any form (17), and that the

(17) In Justinian's time it was done by a simple declaration before a magistrate. Though the son by emancipation lost all strictly legal right to the paternal estate, yet he soon, by the Prætorian power, was enabled to enforce his equitable claims, and the father succeeded to the estate of an emancipated son, though not as father, yet as patron. The privileges so often alluded to on account of number of children called usually the *jus trium liberorum* (though five were requisite to give them in the provinces, and four in Italy out of Rome), were excused from guardianship, preference among candidates, precedence in office, and an immunity from all personal duties.

Under this head appears in the Institutes the first direct mention of the celebrated *jus postliminii*, the parent losing his paternal powers by captivity, and recovering them with his liberty recovered. It is thus described in the Institutes: "Postliminium fingit eum qui captus est, in civitate semper fuisse." Inst. lib. 1. tit. 12. And thus defined in the

practice of fathers putting their children to death is admitted to have taken place, at so late a period as the time of Augustus.

5. §. / Pandects, lib. 49. tit. 15. " Jus quo perinde omnia reffi-
 a. si " tuuntur jura, de si captus ab hostibus non esset."

CHAPTER V.

GUARDIAN AND WARD.

WE have now traversed the two least useful and most obsolete departments of the civil law, and shall for the future tread on more fruitful ground. Their law of guardianship, though in many respects different from ours, seems to have afforded many useful hints, which were accepted by our early jurisprudence.

Minority at Rome did not cease till twenty-five, and as education is a public concern, guardianship was made a public duty, which no man could refuse, without sufficient excuse, under pain of heavy fine (1).

No minor could appear but by guardian. If he had a dispute with his guardian, a curator ad litem was appointed. Code, lib. 5. tit. 44.

Otherwise by the common law, where the dispute was with his guardian. See Ayliffe.

(1) This compulsion, and the different period for full age, are the great distinctions between the Roman guardianship and ours.

Guardians were appointed not only to infants, but to idiots, lunatics, women, and even prodigals.

The magistrates (2), either assigned the guardian, or confirmed the one appointed by the individual or by the law.

The guardian was either a tutor or a curator; the tutor had the charge of the person, the curator of the fortune of the ward. Such is the sense in which these words are understood by Mr. Blackstone, and certainly is their meaning in our spiritual courts; but they frequently, and, I think, most usually mean, in the civil law, the tutor a guardian till puberty (3), the curator from thence to twenty-five: the first appointed for the minor, the latter chosen by him.

Guardians were (as with us) sometimes appointed by the will of the father, sometimes by the disposition of law, and sometimes by the office of the magistrate, and were accordingly styled testamentary, legal, or dative (4).

(2) These magistrates were the consuls in the time of Claudius. Pliny says, he was thus appointed in Trajan's time. *Plin. Epist. ix. 13.* Antoninus gave the appointment to the prætors only.

(3) *i. e.* Till fourteen in the man—twelve in the woman.

(4) The series of guardians, known to our law, has been thus neatly epitomized by Mr. Fonblanque:

First, *Jure natura*, the father or mother of their heir apparent till twenty-one.

Testamentary guardians could only be appointed to children or grandchildren under puberty, in

The nature of the guardian *jure natura*, which in the eye of the law is confined in the manner here specified, seems not to have been clearly understood, till Mr. Hargrave published his celebrated note on Co. Lit. 88. b. The usage in common conversation of calling parents the natural guardians of their children, however abstractedly true, is not true in law: after the infant's age of fourteen, they have no power of guardians. They are pointed out by nature as the natural persons to be *appointed* guardians of their children; but, until application be made to the court to appoint them guardians, they are not legally so.

Yet in 2 Atkyns, 15. 3 P. Wm. 152. and 1 Vesey, 158. Lord Hardwicke is made to speak of parents as guardians even by nature of their daughters.

Secondly, *In focage*, the next of kin to whom the lands could not descend, and this was only till fourteen, and of things that lie in tenure.

Thirdly, By the statute (14 and 15 Ch. II. ch. 19. in Ireland), the appointee in a father's will. This extends to all the minor's estates, and may be till twenty-one, or any less time.

Fourthly, By custom.

Fifthly, The person appointed by the spiritual court, of personal estate only.

Sixthly, The King, for allegiance and protection are reciprocal. Thus far Mr. Fonblanque.

The restriction on the guardian in focage, that he cannot be a possible heir, is the great triumph of the common law-

the power of the appointer, and being his natural heirs; they might to posthumous children, who were deemed already born, as to every thing that respects their advantage.

If, however, a mother or patron, or other person, after having devised their property, appointed

yers, who say, that the civil law, by a contrary regulation, agnum lupo committit; a triumph, however, which Lord Macclesfield, 2 P. Wms. 262, said was worthy only of a nation yet uncivilized. Solon, however, was of the same opinion with the English lawyers—Lycurgus with the Roman. Charondas separated the care of the person and estate, giving that of the latter to the next heir. Many causes induce applications to the spiritual court to be appointed tutor or curator, e. g. where a deceased person has left children under age, and no person willing or legally entitled to administer, it may be necessary for some friend to be appointed curator in the spiritual court, in order to lay a ground for applying for administration.

A testamentary guardian must, by the statute, enter into recognizance in chancery for the faithful execution of his trust. Chancery can check and punish offences in guardians: upon bill, if the minors are not wards of chancery; upon petition or motion, if they are. Wards of chancery are e. g. those whose guardians are appointed by the chancellor, or whose estates are trust estates in settlement. Chancery can remove guardians for breach of trust, or appoint others. The power of appointing a testamentary guardian is not extended by the statute to mother or grandfather. Where minors, not wards of chancery, guardians may be proceeded against by information, 2 P. Wms. 562.

by will a guardian to the devisee, though the appointment was not good in strictness of law, yet, upon application to the proper magistrates, it was confirmed unless cause shewn, and so even in case of a son previously emancipated. And if there was any defect in a parent's appointment, where the intention was clear, the magistrate was ready to supply the deficiency.

Legal guardians. If there was no testamentary tutor or guardian, the *legal* stepped in of course. So if the testamentary died, or was a temporary or conditional one, he was succeeded by the appointee of the law. The legal tutor was of four kinds.

First, The next heir. — A rule, as we have observed before, so much and so unjustly condemned by the English lawyers (5); if there were several relations equal in degree, a joint guardianship (6) was granted with benefit of survivorship; but if the first guardian or guardians were dead, they were not succeeded by their next of kin, but by a new guardian appointed by the magistrate (7). The mother or grandmother were, however, sometimes preferred to the next male heir.

(5) To this may be compared our guardian in focage,

(6) With us, of those of equal degrees, the eldest will be preferred as guardian. 1 Instit. 88,

(7) With us, if, before a minor arrives at fourteen, guardian in focage dies, the guardianship shall not go to an executor, but to the ward's next of kin. Pl. 294;

Secondly, The patron.—The patron was the natural heir of the slave, who was made free; he was obliged, therefore, to undertake the guardianship of the freed person of a minor, because, as he reaped advantage, he was also to bear inconvenience (8).

Thirdly, the parent.—If the child was manumitted while a minor, the parent became his legal guardian (9).

Fourthly, The fiduciary tutor or guardian.—This was the son of a deceased parent, who had manumitted his children or grandchildren, and so, as in the preceding case, had become their legitimate guardian. On such parent's death, his son became fiduciary tutor, both to his brothers and brother's children, and to his own, if they had been emancipated by the grandfather.

The legitimate and dative tutor took an oath nearly resembling that of our executors and administrators, to administer faithfully, and to render a just account when required: they also were obliged to give security, and to make an inventory of the minor's effects to be attested by a public notary and other witnesses; besides, all their effects were tacitly pledged for the due execution of their trust.

(8) To this may be compared the guardianship of old, vested by our laws in the lords of manors.

(9) As with us, he is guardian by nature and for nurture.

Justinian ordained, that where the property did not exceed five hundred solidi, the inferior magistrates in the provinces, together with the bishop, might appoint guardians (10).

The duty of a guardian nearly approached to that of a father (11); he was bound to take care of the ward's person and estate, as far as a careful and diligent father would, and to lend his autho-

(10) Code 1. tit. 4. De Episcopali Audientia: Mr. Hargrave disputes the rightful origin of the power of the modern chancellor to appoint guardians to infants. Mr. Fonblanque vehemently supports it. It is astonishing that neither of them has observed how naturally this power was suggested by that of his prototype and model, the Roman prætor, as that of the ecclesiastical courts to appoint curators, was by the above-mentioned power given by Justinian to bishops. Such a power, though not given by special commission in Ireland, any more than in England as to minors, as it is with respect to idiots and lunatics, cannot now be doubted; and, indeed, the extreme care of minors, and vigilant enforcement of the duty of guardians, which has of late years done so much honour to the chancery of Ireland, would make it a melancholy question, if it could.

(11) For the English law respecting duties and powers of guardians, see among others particularly the cases of *Dagley v. Tolfeny*, 1 P. Will. 283. *Duke of Beaufort v. Berty*, 1 P. Will. 702. *Goodall v. Harris*, 2 P. Will. 560. *Palmer v. Danby*, Prec. in Chan. 137. *Wray v. Williams*, Prec. in Chan. 151. *Ward v. S. Paul*, 2 Brown, 583.

The act of a guardian, where a reasonable one, is as valid as if done by the infant at full age; otherwise, if wantonly done without any real benefit to the infant. *Pierſon v. Shore*, 1 Atkyns, 480.

rity when necessary. As to the first, he was to take care that the ward was properly educated according to his quality, either at his mother's house, if he had one, until she married a second husband, or in some other suitable place, to be judged of, if necessary, by the prætor. Testamentary guardians, or those appointed by the magistrate upon inquisition, had already received an approbation, and were not to be doubted.

The guardian was not to alienate lands or moveables of the minor's of any considerable value without the decree of a magistrate; he might sell things perishable, but ought not to be a purchaser himself, except at open auction (12): he received debts due to, and paid debts due by, the minor (13); he was not to let the minor's money lie dead, but to employ it to use: if he did not, it was presumed that he used it himself (14), and he was liable to

(12) Lord Hardwicke said it was improper for a guardian to purchase his ward's estate immediately on his coming of age; but if he paid the full consideration, it could not be set aside. *Oldin v. Samborne*, 2 Atkyns, 15.

(13) Guardian may, without the direction of a court of equity, pay off a mortgage, or the interest of any other real incumbrance. *Prec. in Chan.* 137.

(14) By the law of England he is not obliged to put out at interest the minor's money, without the authority of chancery, and if he does, it is at his own risk; but as he must account annually in chancery, if he neglects to do so, and thereby to empower the court to put out the money, he may be charged with interest.

interest. This was the law by the Digest, though afterwards altered by the Code: he was not to suffer by accidents (15); but if he brought vexatious actions knowingly, the loss must fall upon him: he could not give up any rights of the minor (16); if he advanced his own money in defending them, he was entitled to interest (17). At the minor's age of twenty-five, his authority ceased.

The minor could do no act legally without the approbation and authority of his tutor; he might indeed receive gifts, but he could not enter into contracts: if he did, he was not bound thereby, although others might be bound to him. But if he took upon himself to contract, and therein gained advantage by fraud or deceit, he was bound. So if, being in partnership, his partner laid out money, and thus improved the common stock, he was bound to advance his proportion (18). In

(15) He is not to suffer by accidents. 8 Co. 84.

He shall have allowance of all reasonable expences. Co. L. 89.

Guardian must keep down the interest of a mortgage out of the profits. 2 P. Wms. 279.

(16) Infant's answer by his guardian, no evidence against him. Carthew 79. 3 P. Wms. 279.

(17) At twenty-five full age was attained, and until forty-six every person was deemed and stiled young—a comfortable rule for those who do not like to be thought old.

(18) With us, he may go in debt for necessaries, without the authority of his guardian. So, for instruction, may

all other cases, the confirming authority and interposition of his guardian was absolutely necessary. He could not be an instrument in the transfer of property, either by alienating his estate, or borrowing (19) or lending money, nay, not even by paying it; for the law went so far as to say, that if he paid a debt without the authority of his guardians, it was no payment or discharge. His estate, though it could not be alienated by himself or guardian, might be sold by a creditor to satisfy a mortgage debt; he might indeed, when of age, confirm a sale made during minority, either by express words or tacit acquiescence for five years from that period (20). Any controversies touching the estate of the minor were to be postponed to his age of puberty (21). Guardian could not

convey as trustee or mortgagee, under the authority of the court: if seized of an advowson, church must be filled; but he cannot go into trade or partnership. He may contract without his tutor's authority, and his contract is not void as at Rome, but voidable on his coming of age; but there is a likeness to the Roman *auctoritas tutorum* in the necessity of suing and being sued by his guardian.

(19) The *Senatus consultum Macedonicum*, which forbade any action or demand on account of a loan to minors, even after their fathers death, has been particularly introduced to our notice by Lord Hardwicke, in the remarkable case of *Lord Chesterfield v. Janssen*, 2 Vesey, 125. This decree took its name from Macedo, a famous usurer.

(20) Four by the Scotch law.

(21) *i. e.* In the language of our law, the parol demurred,

be called to an account till his guardianship expired (22); but, of course, might account if he pleased. These provisions are found in 1st book Inst. and 26 and 27 Dig.

Curators.—When the minor arrived at fourteen, he was freed from tutorship, but might take a guardian till twenty-five, called a curator, and latterly was obliged to do so. Curators were also appointed to idiots, lunatics, prodigals, and women. Also to take care of the estate of a lurking debtor, of a prisoner of war, or an heir in utero (23).

Persons forbidden to be guardians were the debtors or creditors of the minor—persons deaf, dumb, and blind—a father-in-law—prodigals—women, except the mother or grandmother—and those who

(22) With us he may by means of a *prochain ami*; nay, it is said that any person may call a father to an account. 2 P. Wil. 119.

(23) Men of twenty, of excellent character, and women even of eighteen, when of exemplary prudence, were often excused from having guardians by special privilege, and latterly the custom of assigning guardians to women fell entirely into disuse. Lord Hardwicke seems to intimate an opinion, in the case already quoted, relative to an improvident bargain made by the famous Mr. John Spencer, that the want of the Roman law of curators to noted prodigals, has established that trade of annuities and post obits, so universally exclaimed against, 2 Vesey 129.

appeared to seek it, whose eagerness was justly suspected (24).

Legal excuses were age, viz. seventy years—*jus liberorum*—employment in the revenue—absence on account of the commonwealth—poverty—want of skill—profession of the liberal arts—and holy orders. See 1 book Inst. de suspic. & excus. tutoribus. Also 5th book of the Code.

(24) If a mother, when guardian, married a second husband, before she passed her accounts, his estate stood a security to the minor. Code 8. 18. 6.

CHAPTER VI.

CORPORATIONS.

HAVING discussed the rights and duties of natural persons, we proceed to artificial, which are called bodies politic, or corporations. The necessity of such bodies is evident, whenever rights ought to be continued beyond the lives of the persons possessed of them. That rights should in this manner survive, must be often requisite to the good of the public, and the most easy and convenient way of keeping them alive is by the creation of such artificial persons, a kind of intellectual bodies, consisting of individual members, but, in the abstract, distinguished from them; all the individuals that have, that do, and that shall compose the corporation, make but one person in law, and that a person endued with immortality.

The convenience and necessity of such institutions, produced them at Rome so early as the reign of Numa(1). They were called colleges or

(1) J. Blackstone gives the honour of the invention to Rome; Dr. Ayliffe to Athens and to Solon. The latter, I think, is right; and the Pandects seem to confess it, 47. 22. 4.

universities; names there applicable to all kinds of corporations, for whatever purposes created, (and even to voluntary societies,) but which, in modern times, have been more usually confined to those instituted for the education of youth, and the advancement of learning.

The civil law divided corporations into ecclesiastical and lay, into civil and eleemosynary; but the distinction into aggregate and sole was unknown to them (2); all their corporations were aggregate, and three were always necessary to form a corporation (3). It was essential, as it is with us, that the corporation should have a name; for how could it sue or be sued, or perform any of its functions, without a name? which is the very bond and link that ties together the combination.

I shall now consider how corporations were created.

Secondly, their powers, capacities, and incapacities.

(2) *Sole* corporations, consisting of one person and his successors, are entirely the invention of modern times.

(3) By the canon law two might make a corporation. Corporations are by our law divided into sole and aggregate, ecclesiastical and lay, civil and eleemosynary. Universities, says Blackstone, are civil, not eleemosynary, for the stipends are not mere donations, but payments for work and labour done; but the colleges in universities, says he, are eleemosynary: *now why does not the same reason extend to single colleges?*

Thirdly, how dissolved.

Corporations were formed, as appears to me, by the permission or grant of the Prince (4), or, at least, by a decree of the senate at Rome; in which respect, I have ventured to differ, with deference, from Mr. Justice Blackstone, who says, that the civil law differed from ours, in as much as by it corporations, says he, *seem* to have been erected by the mere act and voluntary association of the members, provided such convention was not contrary to law, for then it was an unlawful college; it does not appear, says he, that the prince's consent was necessary to be actually given to the foundation of them, but merely that the original founders of these voluntary friendly societies (for they were little more than such) should not establish any meetings in opposition to the laws of the state. Now, this is true of common mercantile partnerships, or of temporary societies, formed

(4) In England and Ireland the king's consent, either expressly or impliedly given, is necessary to the creation of any corporation; and I am the more emboldened in advancing the opinion in opposition to Judge Blackstone, *that the civil law does not differ from ours in this respect*, because, by using the word *seems*, he appears not to have formed a decisive opinion. The king's consent with us is impliedly given in the case of such corporations as exist by common law, and are *so virtute officii*, such as bishops and parsons, or have existed time out of memory, such as the corporations of ancient cities. To the existence of these corporations former kings are supposed to have given their concurrence,

for the interests of particular persons, and to continue during their lives; but as to public and permanent communities, intended to be perpetual like our corporations, they appear to me to have been always confirmed by decree of the senate, or by the imperial constitutions; thus Dig. 3. 4. 1. mentions the corporations of bakers, and of pilots, to have been thus confirmed; and Dig. 47. lib. 22. 3. says expressly, that every corporation is illegal, *nisi ea vel senatus consulti auctoritate vel Cæsaris coierit*, and I am confirmed in this opinion by the great care taken to prevent unlawful colleges, *i. e.* illegal meetings or associations, which the governors in the provinces were empowered to disperse, by powers something like our convention bills, with particular injunctions respecting those of the soldiery, see Dig. lib. 47. tit. 22.

The powers, capacities, and incapacities, of corporations in the civil law much resemble our own.

First, The corporation thus established, from its very end and nature, acquired a power of electing new members to replenish vacancies.

though, by lapse of time, no traces of such exercise of the royal authority now remain. This power of erecting corporations may be granted by the king to another, *for qui facit per alium, facit per se*, his subject is but the instrument. The chancellor of Oxford has such a power: these positions are not meant to contradict the power of the three estates to erect a corporation by act of parliament; but then the king is a party, and the charter or letters patent still usually proceed from him alone.

Secondly, The corporation, like a private person, might contract, sue, or be sued; might grant, but could not purchase or receive donations of lands without a licence(5), nor alienate without just cause.

(5) *Collegium si nullo speciali privilegio subnixum sit, hereditatem capere non posse dubium non est, lib. 8. code de hered. instituen.* Their law, therefore, in general corresponded with our statutes of mortmain, of which it seems incumbent here to give a short account; and yet our mortmain acts have always been ascribed to the principles of the feudal system, because alienations to corporate bodies deprived the feudal lord of his chance of escheats, since such tenants could neither be attainted or die; and of his military services, if the grantees were of a religious fraternity.

The mortmain acts render void all gifts, grants, and alienations, of lands or tenements to any corporation whatsoever, without licence from the king, and even this is not always sufficient; the principal of these having been made before the reign of Henry VIII. (until whose reign the power of willing was not general) did not affect devises by will. In the statute of wills, therefore, corporate bodies are expressly excepted; that statute is in Ireland, 10 Car. I. sess. 2. ch. 2. but in England, 32 Hen. VIII. The 43d of Eliz. empowered devises to corporations for charitable uses; the corresponding statute in Ireland is 10 Car. I. sess. 3. ch. 1. and confines itself to archbishops and bishops. The English act, 9 Geo. 2. ch. 36, limits very much *their* statute of charitable uses, confining the power of granting for such purposes to an execution by deed indented, with two witnesses, made twelve months before the death of the donor, and enrolled in chancery, with an exemption for the two universities; confining, however, the

Thirdly, They were allowed to hold estates, the common property of the corporation; to have a common chest, and, I suppose, a common seal, or something in the nature of it, or else it is not easily conceived how its will was properly signified; but of this I have found no express mention.

Fourthly, They might make bye-laws for the administration of their own affairs, provided they were not contrary to the several laws of the empire, or their own private original constitution. The existence of this power, though there have been sharp controversies among civilians upon

latter to the purchase of not more advowsons than are equal in number to a moiety of their fellows. An act similar to this of 9 C. II. was never passed in Ireland.

With respect to devises to corporations by will, avoided by the statute of wills, it has been a great question, whether the lands or tenements so forfeited would be forfeited to the crown, or would revert to the heir? a question started in a notable case relative to a bequest to the college of Dublin.

A method was introduced in the times of popery, of evading the statutes of mortmain by granting for superstitious uses, though not directly by name, to corporate bodies, as for obits, chantries, &c. This has been rendered illegal by statute, both in England and Ireland; but they must be entirely distinguished from charitable uses, such as for the maintenance of a school, or an hospital. It is not within the compass of this work, to enumerate the well-known various efforts of ecclesiastical ingenuity to evade the statutes of mortmain; to these efforts, however, we have been obliged for the doctrine of uses and trusts, and of common recoveries.

it, is certain, and always inherent in all corporations.

As to their disabilities, they must act by a syndicate, as with us by an attorney, being an invisible body, existing only in intendment of law; and for the misbehaviour of the body corporate, its governors only were to be answerable in their personal capacities; for instance, it could not as a body be guilty of treason, or forfeit therefor; and in these respects our laws agree. Corporeal injuries it cannot receive, being intangible; but it may be injured by libels, and punish them in its corporate capacity. It could not be outlawed, nor excommunicated, any more than with us; for says sir Edw. Coke, without intending to laugh, it has no soul.

Among other inferior incidents, one naturally offers itself to our enquiry, viz. How many votes, or what majority of a community, bound the rest? Mr. justice Blackstone says, the act of two-thirds was considered as the act of the whole; whereas, with us *any* majority will do. Mr. Wood and bishop Halifax are of the same opinion. My reasons for differing, and thinking that the act of *any* majority was considered as the act of the whole, are contained in the note beneath (6).

(6) I have already noticed one error of Mr. Justice Blackstone, as to corporations; here seems to be another. The writers above mentioned refer to but one authority, viz. 3 lib. Dig. tit. 4. c. 3. Now, if it were consistent with our just reverence for them, or possible to doubt their in-

Corporations were dissolved at Rome by the prince, by deaths, by surrender, by forfeiture. So with us, corporations may be dissolved by act of parliament, whose power is said to know no limits, but is on them very sparingly and cautiously exercised—by death of all the members, vacancies not having been filled up, which is a case extremely improbable—by surrender of its rights, which corporations will seldom think of doing, and seldom could, without betraying their

dusstry, we might be almost tempted to imagine they never looked at the original, which is *nulli permittitur nomine civitatis vel curiæ experiri, nisi ei cui lex permittit, aut lege cessante ordo dedit, cum duæ partes adessent, aut amplius quam duæ*. The chapter or title is upon the appointment of a syndic or attorney by a corporation; the paragraph relates merely to that one case, and requires not the assent, but merely the presence of two-thirds: now, compare with this the two following authorities, which they have not mentioned, *Refertur ad Universos, quod fit per majorem partem*, 50 lib. Dig. 17. 160. & *decreta quæ non legitimo numero decurionum coacto facta sunt non valent, lege autem municipali cavetur, ut ordo non aliter habeatur, quam duabus partibus adhibitis*, Dig. lib. 50. tit. 9. 2. 3. *de decretis ab ordine faciendis*. The former authority speaks universally; the latter, though said particularly of municipalities, is universal in its principle. I do not deny, that the presence of two-thirds or more was necessary; but the voice of the majority of that number so present, operated as the voice of the whole.

So again, *Quod major pars curiæ effecerit, pro ea habetur, ac si omnes egerint*, lib. 19. Dig. *ad municipia*.

trust (7). By forfeiture, in consequence of some of their franchises, rights, privileges, or duties, being neglected or abused; but as such causes of forfeiture in general are trifling, and cannot be taken advantage of, but by extreme strictness, or *summum jus*, and have, when insisted on, usually arisen from sinister or arbitrary views in government, proceedings to vacate charters, on account of such forfeitures, have been, and are, deservedly odious. The arbitrary proceedings in the time of the Stuarts, to abrogate the charters of the city of London, and other corporations, from whom they found a determined opposition to their encroachments, will sufficiently explain my meaning.

We must not omit among modern questions, respecting incidents to corporations, powers given by founders to the heads of societies, in some instances, of putting a negative on the wishes of the whole, or greater part of the body, which have been so warmly controverted and denied, I think I may say exploded, within these few years. The power of founders to insist upon unanimous consent to a corporate act, or to prevent a majority from binding the rest, unless that majority consisted of a certain number, had been in England defeated by stat. 33 H. VIII. ch. 27. But in

(7) A severe censure was passed in the house of commons of Ireland, 1641, on the surrender of the charter of the college of Dublin; see 1 Commons Journal, Irish.

Judge Blackstone's opinion, a negative power in the heads of colleges remained; his opinion, however, has been much controverted of late, and among those who think him to have been mistaken, we may reckon the learned professor at Cambridge, Dr. Christian.

We have no such statute in Ireland as 33 H. VIII. ch. 27.; but for the most part, especially in colleges, there is no occasion to resort to any act of parliament to oppose such a claim, but only to the plain words of the corporation statutes (8).

By the civil law, consonantly with reason, if criminality was annexed to the acts of the mem-

(8) If it was undoubtedly given, it might be a question whether, we having no such statute in Ireland as 33 H. VIII. the power could be disputed? but in most cases where it has been claimed, and particularly in the college of Dublin, there was no occasion to recur to any act of parliament to defeat the claim, but merely to oppose it, by shewing from the local statutes that no such power had been granted, and that the claim has been founded in error: this has been done in the university of Dublin, in a recent most ingenious legal pamphlet, usually ascribed to a very learned member of the same, and the opinion of him and his brethren was confirmed by that of the visitors. Similar determinations have been made by the court of king's bench, Cowper, 337; and by the visitor of Clare Hall, Cambridge, upon similar expressions, which are the usual language of college statutes, *guardianus, magister aut præpositus & major pars seniorum*, that they do not give to such head a negative on the proceedings of the fellows.

bers of a corporation, every one of them was involved in it, who was not able to shew that he had at the time expressly dissented (9).

One species of corporations deserves particular attention, and more ample discussion of their incidents; colleges framed for the advancement of learning (10).

(9) From this position, which I consider as universally applicable, I have been always of opinion, that there is inherent in the members of a corporation, or of the governing part thereof, a power of entering their dissent from any corporate act in the public registry or records of the body; though I know this sentiment is by no means general. I say dissent rather than protest, because the latter is usually supposed to contain the reasons upon which it rests, and I should by no means urge, that every man has a right to insert on the face of the public registry reasons which may be futile, absurd, or insulting to the majority; but it seems to me conformable to every principle of reason, that he should have a power of expressing his dissent, in defence of his character, as well as protection of his person or property.

(10) It was not till after the revival of letters in Europe, that colleges and universities began to assume their present form. Indeed, I think it may be said, not until the thirteenth century, for it is in that century that first occurs some obscure mention of academical degrees; much of the honour, however, of founding and putting them into their modern shape, is attributed to Peter Lombard, at Paris, and Gratian, at Bologna; the former of whom lived in the eleventh, and the latter in the twelfth century, and probably they were, during those two centuries, making their progress from the form of common schools in cathedrals and monasteries, where, for the most part, grammar only

These, in their present state and form, seem to have been entirely the fruits of modern invention. The Grecian youth, who attended the schools of

was taught, to the complete constitution of colleges, which they attained in the thirteenth century, when they began to confer degrees. It may be asked, was not Oxford with some other universities founded as early as the ninth century? It is true, there were numerous students there, and professors who read lectures in grammar, rhetoric, divinity, philosophy, arithmetic, geometry, and astronomy; but still such seminaries of learning were usually called only schools or studies, and were not founded or endowed, or furnished with powers of bestowing public distinctions on learning, like degrees, nor did the students live under the same roof. The university of Paris was the first which assumed the form of our modern colleges, and from thence other universities originally borrowed most of their constitutions.

The civil law claims particular merit in the advancement and encouragement of these seminaries, for it was at first chiefly owing to that inordinate and universal passion, which seized mankind, (after the discovery of the pandects at Amalfi,) for the study of this law, that such numbers flocked to the universities where it was taught. The objects of study in these revered communities were divided into four branches: divinity, law, and physic, composed three of these; and the arts and sciences, cemented under one head, formed a fourth. The power or faculty of teaching these was bestowed by the state to the seminary, by the seminary to the individual, and hence, in process of time, these branches of learning came to be called *faculties*, and the criterion or essential difference of an university was the power and licence of teaching the four faculties, the supposed compass of *universal* knowledge; hence, in my opinion, even independent of the special words of its char-

philosophy and rhetoric, listened to teachers not authorized by the state, nor formed into corporate bodies on a public foundation, endowed with cer-

ter, Dublin is properly an university; so is Glasgow, though consisting of but one college.

. One of the most distinguishing features of modern universities, is the power of conferring degrees, of the origin and nature of which no better account, in my opinion, can be found, than that given by Attorney General Yorke, afterwards Lord Hardwicke, in the case of Dr. Bentley, who had been degraded from all his degrees by the university of Cambridge: the power of granting degrees, says he, flows from the crown; they were originally in nature of licences to professors in several professorships, and are now titles of distinction and precedence. If the crown erects an university, the power of granting degrees is incident to the grant; they are not properly freeholds, or civil temporal rights, and though temporal rights be *annexed* to them, yet the university is not thereby deprived of their power of degradation, as a bishop, though he has a freehold and a seat in parliament, may be deprived by his metropolitan. That question, however, was not decided by the court, the proceedings against Dr. Bentley having been irregular for want of his being duly summoned, and J. Fortescue, indeed, doubted whether, as degrees proceed from the crown, the university could degrade.

Regents were originally teachers of the younger part of the university, and they were discharged of this onus after they had performed it a sufficient time, and became non-regents; see this distinction discussed in the celebrated cause of the King *v.* the Vice-Chancellor of Cambridge, on the great contest for the office of high steward of that university in 1765, between Lord Sandwich and Lord Hardwicke, 3 Burr. 1647.

tain powers and capacities by the founder, subject to his laws, and possessed of funds distinct from the honorary fees of the student.

The title of bachelor, *baccalaureus*, from *bacca lauri*, was introduced by Pope Gregory IX. in the thirteenth century; the idea perhaps taken from the military order, a knight bachelor, sometimes meaning a young cavalier who had served one campaign, and might be said to have arrived at the first step or degree in arms.

I shall now proceed to speak of collegiate duties, discipline, property, and privileges.

As to their duties, I speak not of the general duty, of promoting sound religion and learning, nor of the particular injunctions of their several special statutes; but of such rules as are prescribed to them by the canons of the church, or the laws of the land. By the act of uniformity, 17 & 18, ch. 2. no form of prayer but the liturgy of the established church is to be used in any college chapel, *under severe penalties*. It is also enacted, that all masters and fellows of colleges, and so forth, must subscribe the acknowledgement of conformity and allegiance, usually called the declaration, on pain of disability or deprivation, and that heads of colleges shall also subscribe the Thirty-nine Articles, and the book of Common Prayer. By the 1st of G. I. ch. 13, in England, all heads and members of colleges must take the oaths of allegiance, supremacy, and abjuration, in one of the king's courts, six months after admission, on pain of deprivation. I find no such act in our statute book; but as the statute of 2 Anne, ch. 6. Irish, had enjoined all persons taking offices, civil or military, to take these oaths, (though it is doubtful whether our fellowships come within these words,) yet we have always thought it prudent to do so, as also to qualify by taking the sacrament.

The state sometimes encouraged the philosopher so far as to give him an assigned and fixed seat of

The canons require in colleges regular performance of divine service, and administration of the sacraments, and enjoin the wearing surplices and hoods.

As to discipline, the particular mode of it being ordained and regulated by the statutes of each college, our principal enquiry must only be, how in general it is to be enforced; and here, besides the ordinary power vested in the immediate and resident governors of the college, there is incident to every college, and indeed to every corporation, an extraordinary or visitatorial power; what makes this less observable in most civil corporations is, that the king is their visitor, and as he can only visit in his court of king's bench, and not in person, we confound his visitatorial power with the exercise of it, in and by that court. All corporations have their visitors, for otherwise, without superintendence and inspection, they might be subject to endless abuses; those merely civil by the king, unless they have been endowed by a subject, and derive all their property and subsistence from him, in which case the subject is esteemed the founder and visitor, though he obtains the charter of incorporation, of necessity, from the king. In eleemosynary the founder is visitor, because, though the incorporation comes from the king, the endowment comes from the founder, and therefore he is rewarded with the power of visitation; it being just, that he who has given his property for a charitable purpose, should have a power of seeing that it be properly applied.

With regard to ecclesiastical corporations, the ordinary is the visitor; this was the rule of the canon law, and is adopted by ours. The king is the supreme ordinary, he therefore can visit the metropolitan, the metropolitan the bishop, and the bishop all spiritual corporations within his

instruction, as the academy to Plato, and the lyceum to Aristotle ; but their disciples did not

diocese, such as deans and chapters, parsons, &c. who are sole corporations.

From these rules we are to deduce who are the visitors of colleges or universities. Of universities being civil corporations, the king is visitor in his court of king's bench, though some say they have no visitor. Colleges are not ecclesiastical corporations, though it was held otherwise formerly, and though from such opinion, where visitors were not expressly appointed by the founders, bishops have frequently usurped the power of visitation, which is remarkably the case of the bishop of Ely, at Cambridge, who by long prescription is now become the acknowledged visitor of many of the colleges there. Colleges then are lay corporations, even though composed of ecclesiastical persons, and are said to be eleemosynary, though the general corporate body of the university is not. The power of visitation of them, therefore, exists in the founder and his heirs, which power they may grant and assign over to others, as is done by the king in our statutes to the visitors there named.

A special visitor being thus made, if he does not exceed his powers, *i. e.* if he determines on a matter which comes within his jurisdiction, though his determination be wrong, it is final and conclusive, and there is no appeal. This was decided in a very solemn manner, and after much debate, in the reign of King William, in the famous cause of Philips and Bury. The case was briefly this: Dr. Bury, rector of Exeter college, Oxford, deprived Colman, one of the fellows, for incontinency. Colman appealed to the bishop of Exeter, visitor; the visitor ordered him to be restored, the rector and senior fellows refused to obey the order. The visitor suspended five senior fellows, and deprived the rector for contumacy. He appealed to the king's bench, and the

obtain, in consequence of their attendance, any privileges similar to those of graduation with us,

principal question was, whether the king's bench had any power to relieve him? Holt, Ch. J. a most eminent and public spirited judge, thought they had; the three other judges thought otherwise; and the opinion of that majority has been the rule of the court ever since, who favour the doctrine on this principle, that law suits among members of learned seminaries should be discouraged as much as possible, and that it is better that one person should suffer, than that the discipline, government, and peace of the college should be destroyed.

The same doctrine was held in Dr. Bentley's case, who was suspended from all his degrees for contempt of the vice-chancellor, who had issued a process against him at the suit of another famous man, Dr. Conyers Middleton. Bentley applied for a mandamus in the king's bench, and obtained it, because the university, in their return to the conditional order, had not set forth that there was a special visitor, which, therefore, did not officially appear to the court, who otherwise would not have interfered.

But the king's courts may interfere as to the public laws of the land, for the founder can only give the visitor exclusive jurisdiction as to his private statutes, and the laws of the college; for instance, if fellows of a college should refuse to take any oaths, prescribed by law, previous to their admission.

The visitor, however, must observe his power, and if he exceeds it is liable to an action; if the question be, whether an offence is committed? he is the proper judge, and perhaps of the kind and degree of evidence necessary to convict; but if he punishes for that which is clearly no offence, does not come within the statute, or is clearly not cognizable under his visitational power, an appeal lies to

nor was that course of study made a necessary preparative to any profession; whether this system

the king's courts. This may be illustrated by a case which was decided so lately as Easter term, 1788, in the king's bench, England. The fellows of Peter House, Cambridge, according to the power given them by their statute, had nominated and elected two persons for the office of master of the college, and returned them to their visitor, the Bishop of Ely, that he might chuse one of them, which power of election was all the statute gave him; he rejected both on pretence that lapse had incurred, and from his general visitatorial power appointed a third. *Mandamus* went to make him choose one of the two elected. I may here observe, that if several academical persons offend jointly, they may, as in other cases, be punished severally, *e. g.* if the college seal be improperly applied or used, it is no defence to any individual, when severally attacked, to say, that he set the seal in conjunction with his brethren; hence again, a power of protesting is necessary.

If there be a dispute or question who is visitor, it must be tried by the king's courts.

I will beg leave here to add two cases which occurred, the first in 1775, the next in 1776; *King v. Grunden*, and *King v. Windham*. In the first, Charles Crawford, a fellow commoner of Queen's College, Cambridge, had been expelled; appearing afterwards in the garden, he was turned out, and indicted the person so turning him out for an assault: it was determined, that independent members are mere boarders, have no corporate rights, and cannot appeal to the visitor.

In the *King v. Windham*, who was warden of Wadham College, a bill had been filed in chancery against the warden, fellows, and scholars. The warden disapproved of the answer of the fellows, put in a separate answer of his own,

was the best, I have not here room to enquire. It has been discussed by Dr. Smith, in his *Wealth*

and refused to put the college seal to their answer, thinking there was some contradiction in this to his own private answer; the parties applied to the visitor, he refused to interfere. The majority of the fellows then applied to the king's bench for a mandamus; it was granted, and the court said, that the visitor was right; that visitors are only to decide private disputes between members of the college, and not a suit by a third person against the whole body. So, where an estate is in the college, and they are to act in a trust, the visitor cannot meddle in a matter which is the subject of such trust. Vide *1 Vesey*, 463.

As to college property, having already mentioned their inability to take or purchase without a licence, I shall only observe, that the governors of it, being only trustees for the purposes of the institution, can never alienate its property except from absolute necessity, such as existed here at the time of the revolution, *and the same was the rule of the civil law*: grant it they may in lease, for that is necessary, and evidently for the benefit of the college; but their leases are not valid if made for more than twenty-one years; and until a late remarkable statute in 1796 changed the law in *Ireland*, it was necessary to reserve a moiety of the full value; in England they may also lease for three lives, 13th Eliz. ch. 10, reserving in rent a moiety of the yearly value; the private statutes of a college may restrain it to fewer years. The 18th Eliz. ch. 6. in England, requires that in all college leases, one-third part of the rent shall be reserved and paid in corn, by which means part of the rent, at least, is prevented from decreasing with the value of money. By the civil law corporations could lease only for one life, or ten years; by the canon only for three.

of Nations, who seems to lean much against modern universities. But, perhaps, I may embrace

I shall conclude with a few words, on the privileges of colleges; and here, I am sorry to say, that I am forced chiefly to look abroad to English universities. Their civil jurisdiction, that union of civil and academical power, which takes place at Oxford and Cambridge, could not possibly exist in this great metropolis. But they have many privileges which might be communicable to us: some of them highly useful; all honourable.

Such are the exclusive privilege of printing certain books, and the concurrent right of printing others, as acts of parliament. 32 Geo. II.

The privileges of persons who have taken the degree of master, with respect to holding two livings. The privileges respecting post letters, not being under the controul of the General Post Office, or, at least, only with certain provisos.

The giving to the universities the presentation to livings belonging to popish recusant convicts. The dispensing with residence to clergymen, abiding for study in the universities, and the exception in their favour which we mentioned above, as to bequests to charitable uses.

The qualification of property requisite to enable persons to represent the universities in parliament, is dispensed with in England with respect to members of the universities themselves; but this exception is unnecessary in Ireland, there being no such qualification act.

In exemption from taxes, we enjoy much the same privileges with the universities of England; and however flattering it might be to obtain their smaller exemptions and privileges, while we rival them in sound learning and useful science, we have little to envy or to lament.

some other occasion of meeting the many and various recent attacks upon these celebrated seminaries.

The compliment which the law has paid them, of ordering that copies of all books published shall be deposited in their libraries, which, indeed, extend also to the libraries of the four Scotch universities, has been, by a late act, extended to the university of Dublin.

Miscellaneous Cases respecting Colleges, determined since the year 1785.

A mandamus lies to a visitor to hear an appeal and to give some judgment, *Rex v. Bishop of Lincoln*, 2 Term Rep. 338.

The visitor of Jesus College, Cambridge, need not hear parol evidence on an appeal; it is sufficient if he receives the grounds of the appeal, and answer it in writing. *Rex v. Bishop of Ely*, 5 Term Rep. 475.

N. B. The doctrine in the last case seems to be general, but appears so extraordinary, that it is to be hoped, from some expressions in the case, that it applies only to that particular college.

If no special visitor be appointed by a founder, in default of his heirs, the right falls to the king. *Rex v. C. Hall, Cambridge*, 4 Term Rep. p. 433.

English Statutes allowing privileges to the universities, mean only the English universities. *Jones and Smart*, Term Rep. 449.

It is said, that a visitor cannot compel a specific performance of an agreement between a college and a stranger; nor can a visitor administer an oath. See *Cowp.* 378; and *Douglas*, 342.

As to alteration of statutes, see the case of *Bentley v. Bishop of Ely*, in the Appendix.

At Rome, in the times of the emperors, the professors in different sciences began to receive regular stipends out of the public treasury, to be authorised by the state, and to become subject to regulations, and a form of discipline, by it ordained. Constantine, Theodosius, and Justinian, seem to have been the chief promoters of these plans. The institutions for the purpose of teaching the laws in particular, begin from the third century, to offer an appearance somewhat resembling modern colleges. If we had here full leisure to examine the traces, handed down to us, of the legal schools of Rome, Constantinople, and Berytus, now Beroot in Phenicia, to which three places Justinian latterly confined this study, we should find some strong marks of affinity. We know that the students in those places went through a course which lasted five years, and were divided into five several classes, with distinguishing names to each; during the first, or freshman year, they were called *dupondii* (11), a name in-

As to college chambers, see Attorney General *v.* Stephens. Appendix.

The extensive meaning of the word *mores*, in college statutes, the case *ex parte* Wrangham. Ibid.

As to college leases and fines, the case of Wynne *v.* Bampton, 3 Atkyns 473. Ibid.

(11) The lower classes have always been subject to a joke; in a college in America, where the author was for a short time, the class of the second year were called *Sophimores*, compounds of sense and folly.

timating that they were yet of no value; in the second year they read the edict, and were called *edictals*; in the third *papinianists*, their study being Papinian's works; in the fourth *λυτοι*, from *λυαν*, as having a power to answer questions like our bachelors; in the fifth *αλυτοι*.

In the 11th book of the code, tit. 18, it appears, that no persons, under pain of infamy and banishment, were permitted by law to teach as public professors, though they might as private preceptors in private houses, unless established by government, and that the government had established in the capitol a foundation of public professorships, viz. one of philosophy—two of law—three latin professorships of rhetoric, four of grammar—five greek professors of logic, and four of grammar, who could not teach privately under the same penalties of exile and infamy.

The honors and privileges bestowed in consequence of proficiency in science, are every where to be found in the Justinian law. The professors and students were exempt from civil offices, and from the reception of strangers; no noisy trade could be carried on near these seminaries, which were usually called auditories; they were free from all ordinary taxes, and after twenty years (some say thirty) honourable exercise of their profession, were entitled to the rank of count or comes; an honor the nature and degree of which is not very clear, counts, or *comites imperatoris*, being very various in station, power, and honor.

To obtain these privileges, among other requisites, to be matriculated was indispensibly necessary; and questions have been made, whether a man who was matriculated, and leaves the university with no intention of returning again, afterwards changing his mind, shall have any benefit of his former matriculation.

Constantine is said to have been the first who gave salaries out of the public treasury, though Quintilian, long before, speaks as if he had met with some public emolument, in consequence of twenty years meritorious service.

There was at Constantinople, besides a college for the study of the law, one for the liberal arts, and both there and at Alexandria were celebrated colleges of physicians.

All these colleges were liable to visitation and inspection; the lay by some of the civil magistrates, the ecclesiastical by the bishop of the diocese, as may be collected from the 83d Novel. and the Dig. 47. 22. 1.

By grammar, so often mentioned, was anciently understood not merely the rudiments of languages, but classical learning in general.

RIGHTS OF THINGS.

THE order pursued in this book is as near to that of Judge Blackstone as possible; but as the civil law knew not the distinction between real and personal estates, the reader must not expect to see the titles to things real and personal separately handled, as they are by him, nor consequently the same title repeated; as for instance, by occupancy, by forfeiture, or by will, as he is obliged to do, first under the head of Title to Things Real, afterwards of Things Personal.

ON THE CIVIL LAW.

BOOK II.

OF THE RIGHTS OF THINGS.

CHAPTER I.

ORIGIN OF PROPERTY, AND DIVISION OF THINGS.

THE civil law does not enter into the minute and subtle disquisitions about the natural origin of property, which have employed the pens of Grotius, Locke, and Blackstone. As far, however, as it has touched upon them, it agrees (in the opinion of Mr. Gibbon) with the Oxonian Professor, in deriving it from occupancy. To me it seems rather to coincide with Grotius, who deduces it from an implied compact of nations; for, in fact, it speaks of occupation only as one of the titles to property arising from natural law, *i. e.* says Justinian, from the law of nations, shewing that he is not speaking of the law of nature universally and in the abstract, *as it operates in a state*

of nature, but *only* as it becomes a part of the law of nations. The language of Justinian in the Institutes is this: that all rights to things arise from the law of nature, that is, the law of nations, or from municipal law (1). Under the first he reckons occupancy, accession, and tradition; under the latter, prescription, donation, inheritance, &c.

Next to the consideration of property in *general*, and its origin in the law of nature, natural order teaches us, first, to treat of the division of things, then of property in them, and lastly, of the *particular* modes of acquiring title to them, a method which has been pursued by the clear mind of Mr. J. Blackstone, and which I shall endeavour to follow, especially as Justinian here by no means furnishes a clear model for imitation (2).

(1) Accordingly Mr. Blackstone speaks of that rule of the law of nations, recognized by the laws of Rome, *Quod nullius est, id ratione naturali occupanti conceditur*.

(2) Justinian, in his Institutes, is in this respect extremely immethodical; for, in the first chapter of his second book, he begins with the division of things—then proceeds to the titles to them acquirable by the law of nature and nations—and in the subsequent chapters of the same book returns to divisions of things, and to quantity of interest in them, thereby postponing the enumeration of the other methods of acquiring property, viz. those by municipal law, and awkwardly separating these titles to property from the former, *i. e.* from those arising from the law of nature and nations, by the interposition of the chapter of corporeal and incorporeal things, and of services, usufruct, and use.

In their division of things, the Roman jurists are much more minute, accurate, and metaphysically exact, than ours: things were, according to them, either *in patrimonio*, capable of being possessed by single persons exclusive of others, or *extra patrimonium*, incapable of being so possessed.

Things *extra patrimonium* were common, *i. e.* free to all mankind; public, *i. e.* belonging to some nation or people; universitatis, *i. e.* belonging to some certain city, society, or corporation; or, fourthly, things nullius, *belonging to nobody*, which included all things consecrated and devoted to religious uses, which are distinguished into sacred, sanct, and religious.

This was the division of things in relation to their propertyship—with respect to their nature, they were divided into corporeal and incorporeal—and the corporeal again into moveable and immoveable. This is the order and manner of division chosen by Justinian in the Institutes, and we shall follow it (3).

(3) The order adopted by the famous Roman lawyer, Caius, and apparently approved in the Digests, is somewhat different: he first distinguishes things into those of divine and those of human right—things of divine right he separates into sacred, sanct, and religious—those of human into things *in patrimonio* and *extra patrimonium*—and under the *res nullius*, a sub-division of the latter, considers not only holy things, but those which, though not consecrated, wanted a master, such as the *hereditas jacens*. Justinian confines the *res nullius* to things of divine right.

Things common to all, are those which, being given by Providence for general use, cannot be reduced to the nature of property; such are the air, running water, the sea, and the shores of the sea. By shore, the Institutes mean up to high water-mark, or (where little or no tides, as in the Mediterranean) as high as the highest winter wave washes (4); but if a man by prescription, from time immemorial, had the use of running water (5), as for a mill, his case was an exception to the general rule, but he must not waste the water unnecessarily, and mills and other buildings might be erected on rivers by particular licence. Vid. Digs. 48. 8.

Things public. Among things public Justinian principally notices harbours, banks, and rivers,

(4) Notwithstanding this position of the sea being common, many nations, in modern times, have claimed dominion over parts of it, as the Venetians over the Adriatic, the King of Denmark over the Sound, and the King of Great Britain over the four seas. The learned Selden even contends that the sea is as capable of becoming property as the land. Undoubtedly, where nations have taken upon themselves the burthen of freeing the sea from pirates, or erecting light-houses on dangerous coasts, they have a right to reimburse themselves by duties upon passing ships; nor is it to be understood that foreign nations have a right to use the shore of the country against the will of the inhabitants, except from inevitable distress.

(5) By Magna Charta, the appropriating running water, which it seems unnatural to restrain, was prohibited, consequently the rivers fenced at that time were directed to be laid open.

and the right of fishing in them. By the civil law the rivers were public. Of exclusive rights of fishing the Romans had no notion, any more than of game laws (6); and the inhabitants of the waters became the property of the first occupant; nor was any obstruction or diversion of a river allowed. See Dig. lib. 43.

A bank of a river might have been private property; but it was so far public, that all persons had a right to come upon it for certain purposes; for instance, for a towing-path (7).

(6) It is their peculiar praise, says Gibbon. With us, by the feudal polity, the Prince claimed a right of granting franchises of *free fishery* in rivers, which, by an odd perversion of language, means exclusive fishery; but these rights of fishery, in consequence of *Magna Charta*, must be as old as Henry II.'s time. Probably very few of our present fisheries could boast such antiquity, or are really legal; but being proved to have existed longer than the memory of the oldest men living, are presumed to have been from Henry II.'s time, no proof appearing to the contrary. Many gentlemen in Ireland support their titles to fisheries by grants from Charles II. but such grants convey nothing, being directly contrary to *Magna Charta*, and are only corroborating evidence of the rights being from time immemorial.

A subject may have by prescription a right to a several fishery in an arm of the sea. 4 T. R. 437.

(7) This rule of the civil law, adopted also by our Bracton, was much insisted on in the case of *Ball v. Herbert*, 3 Term. Reports; when, however, it was determined that, by the common law of England, the public are not entitled to tow on the banks of navigable rivers.

Res universitatis, or things belonging to cities or bodies politic. Such things belong to the corporation or body politic in respect of the *property* of them; but as to their *use*, they appertain to all those persons that are of the corporation or body politic: such may be theatres, market-houses, and the like (8).

Res nullius, or things which are not the goods or property of any person or number of men, are principally those of divine right: they were of three (9) sorts—things sacred, things religious, things sanct. Things sacred were those which were duly and publicly consecrated to God by the priests, as churches and their ornaments, their chalices, books, &c.

Things religious were those places which became so by burying in them a dead body, even though no consecration of these spots by a priest had taken place.

Things sanct were those which by certain reverential awe arising from their nature—sometimes augmented by the addition of religious ceremonies, were guarded and defended from the injuries of

(8) They differ from things *public*, the latter belonging to a nation.

(9) For though Caius, in his division of things, makes them to consist of derelicts, treasure trove, the *hereditas jacens*, or an inheritance lying before it be entered on or appropriated; yet as these are of a private nature, and capable of proprietorship, Justinian more properly confines the *res nullius* to things of divine right.

men; such were the gates and walls of a city, offences against which were capitally punished.

We have now done with things *extra patrimonium*, and must remind the reader, that things *in patrimonio* are divided into corporeal and incorporeal, and the corporeal again into moveable and immoveable.

Corporeal things are those which are visible and tangible, as lands, houses, jewels, &c. Incorporeal are not the object of sensation, but are the creatures of the mind, being rights issuing out of a thing corporeal, or concerning or exercisable within the same.

Corporeal things are either moveable, as silver, gold, household goods; or immoveable, as lands and houses (10).

Corporeal things may be unoccupied, or held for life, or lesser term, or in inheritance: in the second case, the English law calls them tenements, in the

(10) Moveables and immoveables are more usually and technically called, by our law, things real and personal: thus Mr. Blackstone defines, in the second chapter of his second book, things real to be such as are fixed and immoveable; things personal to be goods, money, and other moveables; yet, in his twenty-fourth chapter, he is forced to depart from this definition, and to acknowledge that things personal include something more than moveables, viz. what we call chattels real (as leases for years), which he says are of a mongrel, amphibious nature. Such awkward effects arise from our distinctions of real and personal property, and so much superior is the simplicity of the civil law.

third hereditaments. So incorporeal rights may be tenements or hereditaments, as they are to exist for the life of the individual, or to descend to his posterity. The civil law does not make use of these terms; but yet, like the English, in the division of things, pays more peculiar attention to those of an incorporeal nature, which we may, if we please, to keep up the analogy, call hereditaments. .

CHAPTER II.

OF THINGS OR HEREDITAMENTS INCORPOREAL.

THESE being very numerous and various, legal writers have usually selected some of the principal for discussion. This Judge Blackstone has done to the number of ten.

The civilians, though they enumerate many, such as the rights of inheritance and those arising from contracts, refer most of them to other proper heads, and confine themselves under this title to what they call *servitudes* or services. On this head, therefore, of incorporeal hereditaments, the English lawyer is not to expect discussions similar to those of Blackstone, on rents, commons, &c. but rather upon subjects which in the English law would be ranked and considered under the titles of easements or nuisances, for so the services of the Roman law would be classed by us.

It may be agreeable, however, to the reader, before we proceed to these services, to know what the civilians have delivered to us, upon some of the

forts of incorporeal hereditaments, chosen by Mr. Blackstone for special consideration, which are advowsons, tithes, commons, ways, offices, dignities, franchises, corrodies or pensions, annuities, and rents.

On *advowsons* it will be immediately perceived, by the constant of history, little or nothing can be expected. The *jus patronatus*, or right of the person who built and endowed a church to nominate the officiating minister, appears to have been allowed in the Roman law, Nov. 26. tit. 12, ch. 2. and Nov. 118. ch. 23. but was too young and infrequent to afford room for much dispute, or consequently to demand much legal regulation.

Tithes.—The same almost may be said of tithes. In the earliest times of christianity the clergy were supported by gratuitous donation; the piety of the times rendered that support ample and liberal, and prevented or anticipated recourse to any claim of right: that fervour of piety had not subsided in the sixth century, the æra of Justinian's reformation of the law. It is not, I believe, anywhere alleged, that tithes were claimed as a right until the fourth or fifth centuries, though voluntary contributors had often made a tenth the measure of their devout remuneration of the services of the priesthood, and the claim does not seem to have been as yet so general, or so acknowledged, as to employ any chapter in the body of the civil law.

Common, or right of common.—Of this right the civil law treats slightly and generally, among the various classes of services due by the land of one man to another : it recognizes particularly the *jus pascendi pecoris*, but does not enter into special distinctions of the different species of common known to the English laws.

Ways, or rights of way.—The divisions here were special and minute; their rights were either *iter*, *actus*, or *via vel aditus* : *iter* was a right for a man to go on horseback, or in a sedan, over another man's land to his own ; and where such right existed, and the road was out of repair, he who had the right of way might go over any part of the land he pleased (1). *Actus* was a right of walking, riding, driving cattle or a cart, over another man's ground (2). *Via*, or *aditus*, included the two former, and superadded the privilege of drawing stones or timber, or leading any body of men, over the ground, provided it were done without damage to the corn or grass, within a space consisting of eight feet at least straight ways, and of sixteen feet upon turnings. All these rights of way might, as with us, arise from special agreement—permission or reservation—by prescription,

(1) The law of England agrees, says Blackstone ; but he is mistaken, except where the owner of the land is bound to repair. See Doug. 716.

(2) Called in England a pack or prime way.

or from necessity, where one man's land is entirely surrounded by another's (3).

Rents.—All rents could be recovered by distress, and nothing being known to them analogous to the feudal tenures, consequently there were no such distinctions as rent service, rent seek, &c.

The rent might be either in money, or in a certain quantity of provisions, or in a portion of the fruits. The place and time for paying the rent, seem to have been regulated nearly as with us: the time *expressly*; it being a general principle of that law, that he who has a term for paying any thing, is not in delay till the last moment of that time is expired (4); but it does not say with our law, that though the rent be not due till midnight, it shall be payable before sun-set (5). The place *impliedly*, it being a general principle also, that where no place expressed, the thing should be delivered, or paid where it happened to be. Vide lib. 38. Dig. The thing to be paid, therefore, being the fruits, or something in lieu of

(3) A way with us may be pleaded as from necessity; and in pleading, the kind of way must be particularly shewn, whether it be a footway, horseway, or cartway. Vid. Yel. 164. 1 Durn. and East. 560. 6 Mod. 4.

(4) *Ne eo quidem ipso die, in quem stipulatio facta est, quia totus is dies arbitrio solventis tribui potest.* See Inst. de Verb. Obl.

(5) With all due deference to all legal writers, this sounds very like a blunder.

them, I collect that payment was properly made where the fruits were, that is, on the land.

The rent (except in the long leases called *emphyteufes*), was considered in the light of hire, or payment for the fruits of the ground, rather than as it is with us, in the nature of an acknowledgment for the possession of the land. Hence if the lessee suffered by great and inevitable accidents, whether by the hand of God, or from the hand of man, he was discharged from paying rent, during the continuance of the calamity (6); and even if he covenanted to pay his rent notwithstanding accidents, the covenant extended only to such as might be naturally expected from possible changes of weather, &c. and not to sudden and unexpected events, arising from the act of man, such as the inroads of an enemy.

Remedies for recovering the rent.—These were by distress, by ejectment, or by action, as with us.

(6) *Incendia, aquarum magnitudines, impetus prædonum a nullo præstantur*, b. 23. F. de reg. Jur. For the difference of our law in these respects, and its distinctions, see a learned note in Fonblanque's Eq. 1. vol. p. 366. Our law does not discharge the lessee from the payment of rent expressly reserved, even though the premises be destroyed by fire, or demolished by the king's enemies. It should seem by certain decisions that the lessee would have relief in equity. But of the propriety of these decisions, Mr. Fonblanque seems to doubt.

The first followed from the principle, that the furniture of a house, or the profits of a farm, were always implied by mortgaged for the rent. Vide lib. 4. and lib. 7. Dig. But beasts belonging to the plough, and other things necessary to tilling and cultivating the ground, could not be distrained (7), nor the bed or other absolutely necessary moveables of the lessee; an ordinance dictated by the same humanity, which, in the sixth and seventh books of the Pandects, forbids a debtor's wearing apparel, or bed, being taken in execution.

The landlord could seize the effects on the premises to satisfy not only the arrears of rent, but the losses by dilapidations, and that whether these effects belong to his immediate tenants or to their under-tenants; but the goods of the under-tenant could only be seized to the amount of the rent he paid, and if he paid the head landlord, it was a defence in an action by the mesne. F. 13. 7. 11. 5 de pig. act.

The mode by ejectment we find in the Code and Pandects. Vid. 3. lib. Cod. de Loc. and Domat. book 1. lib. 4. we find them speaking of *colonus ejectum pensionum debitarum nomine*; and which is remarkable, the tenant could not only be ejected for non-payment of his rent, but also for damaging

(7) Agreeably to the ancient common law of England.

the house, or premises, carrying on in them an unlawful trade, or making a bad use of them in any other way.

Actions for the recovery of rent.—The mention of these frequently occurs (8); they were favourable actions, and of the species which were called *bonæ fidei* (9).

Besides these spurs to the tenant to be punctual in the payment of his rent, he was also liable to interest upon it, from the time of its being legally demanded.

Having thus sketched the rules of the civil law on some of the incorporeal hereditaments which appeared most important to Mr. J. Blackstone, we shall proceed to the consideration of those which principally attracted the attention of the Roman jurists, viz. servitudes or services.

Services (which, as I have said, either correspond to what we denominate easements, or else would rank among rights to be secured from particular nuisances), were burthens affecting lands, or other subjects of ownership, whereby the proprietors were

(8) *Actions ex locato et conducto.*

(9) The Roman law distinguished between contracts *bonæ fidei* and contracts *stricti juris*. That is, some contracts were so to be interpreted by the rules of honesty and conscience, that they were supposed to include many things not expressly mentioned in the contract, while in others they adhered closely to the very letter of the contract.

either restrained from the full use of what was their own, or obliged to suffer another to do something upon or respecting it. The former were called negative services, such as that a neighbouring proprietor should not build to darken my windows. The latter affirmative, such as a right to a water-course over the lands of another (10).

Services again were defined, rights to which one thing was subject for use or convenience to another thing or person, contrary to common right. They were, therefore, either prædial or personal. Prædial were burthens imposed upon one tenement in favour of another tenement. Personal by which property was burthened, not in favour of a tenement, but of a person.

Prædial services were divided into rural services, or of lands, and urban services, or of houses. The rural services of the Romans were *iter*, *actus*; *via aquæductus*, *aquæhaustus*, & *jus pascendi pecoris*; foot-road, horse-road, cart-road, dams and water-courses, watering of cattle, and pasturage or common.

The chief affirmative services of the houses among the Romans, were those of support, viz. *tigni immitendi*, & *oneris ferendi*. The first, the right of fixing in our neighbour's wall, a joist or

(10) In the former of the instances here adduced, we should deem it a security against nuisance, though we have no general term for such restraints. The latter we call an easement.

beam from our own house. The second, that of resting the weight of our house upon a neighbour's wall. There were, however, many others, such as of a way through another's house, or up his stairs, to apartments not his property; of even overhanging another's ground to protect a house from ruin; of carrying a sink through an adjoining mansion, &c. &c.

Negative services of houses were infinitely various. One or two examples may suffice: such as the restricting of a building formed so as to darken ancient lights, or to throw rain water from its roof upon another's ground; such as the restriction upon injuring the prospect from a neighbour's house, or against opening windows which may over-look another's habitation, and destroy his privacy (11).

Of personal services, or services due from a thing

(11) The term services or servitudes is well known in the Scotch law: in England and Ireland, such rights may be created by special covenant between individuals; and as to many of those above enumerated, they exist of common right, e. g. an action would lie for darkening ancient lights, 9 Co. 58. b. and for overhanging another's house, or putting up a spout so that water fall upon another's premises, Stra. 634. but not for obstructing a prospect, or overlooking a neighbour's retired walk, though I have known a warm contest upon the last point, which however did not come to a decision.

to a person, there were particularly noticed, usufruct, use, and habitation.

* *Usufruct* was the right of using, taking, and enjoying, all manner of profits which arise from a corporeal thing belonging to another person, without any diminution of the substance or property thereof; it might be in cattle, bondmen, or any thing *not consumed in the use* (12). *Use* was a right of receiving so much of the natural profits of a thing as was necessary to daily sustenance.

. *Habitation* was a right of a person to live in the house of another without prejudice to the

(12) An *improper* usufruct might even be of things that perish in the using, as of wine and oil. Our trusts, as Mr. Blackstone has observed, do not correspond to the usufructs, but to the *fidei commissa* of the Romans. Usufructs in the Scotch law are called life rents; the interests of tenants for life or years, among us, may be compared to the usufructs of the Romans. These species of personal services, though they may be created by special agreement, are little noticed among us; but with respect to those of a prædial kind, whenever an English lawyer wishes for information on the practice of easements or nuisances under special circumstances, he cannot perhaps search for general principles, as well as special detail, more successfully than in the civil law, whose disquisitions on these subjects have been much more minute than ours, though the general principles so far agree as to make them, I think, almost equivalent to authorities among us. To go more minutely into the doctrine would be impracticable in an elementary treatise, on my present design.

property: this was assignable, which a use was not; and as the house could be used only for a dwelling, it differed from an usufruct in it, because the usufructarian of a house might have applied it to any purpose, as to a store or a manufactory.

CHAPTER III.

OF ESTATES IN THINGS.

IT has been formerly observed, that though the Roman law distinguished estates in real and in personal things, it had no division of estates similar to that subtle (1) partition amongst us, into

(1) Though a little foreign to my purpose, I cannot help observing a confusion which appears to me sometimes to arise with us as to these terms, as if they were always synonymous to *freehold* and *chattel*.

Real estate, in common parlance, means an estate of indeterminate duration, not *necessarily* including the idea of immobility, as freehold doth.

Thus an estate or property granted to a man and his heirs in an annuity, charging only the person of the grantor, is, says Blackstone, vol. 2. ch. 3. a real estate. Yet it certainly is not freehold nor chattel; and if it were to a man and his executors, it would not be a real chattel, like a lease for years of land, nor a personal chattel, like the parchment on which the deed of annuity was written.

So an estate, or property for life in a library of books, is real estate; but neither freehold nor chattel, though the books themselves are personal chattels.

real and personal; in our sense of those words. We proceed to the quantities of interest in things, known to the Romans.

The highest quantity of interest which any man can have in property, is the absolute, uncontrolled, independent, perpetual power over it (2). This might be had by the Roman law, in that state where possession was perfectly allodial, though the highest estate of an English subject can be only in fee simple. The nature of an allodial estate, that is of one wholly independent, and

A freehold is an estate of indeterminate duration in things immoveable of free tenure; it may be in some, incorporeal hereditaments, as rents and tithes, not in others, as a right of way.

TENURES.

(2) The English reader may perhaps be surprised to find the head of tenures totally omitted in the preceding part, till he is informed that they were utterly unknown to the civil law. They were equally strangers to the English before the feudal polity was introduced: from that period, it has been a fundamental maxim with us, that the king is the universal lord and original proprietor of all the lands in these kingdoms, and that no man doth or can possess any part of them but what is derived from, and *held* under and from him, mediately or immediately, in consideration of feudal services. But the Roman land owner did not *hold* of any superior; his possession was perfectly allodial, and wholly independent. Tenures are the offspring of feudality, inasmuch that Wright and Woodeson observe, that the introduction of feuds and tenures is spoken of as the same fact and event.

held of no superior, is so simple and obvious to every comprehension, that it requires no illustration. Laborious comments are only necessary to the feudal constitution, or doctrine of tenure. On quantities of interest, therefore, the Roman lawyers have said little or nothing.

Estates Tail.—Mr. Gibbon and others have positively asserted that the civil law was not acquainted with entails (3). I will not assert that it was, in the shape to which we have been accustomed, but it appears to me very certain, that restrictions similar to those of entailing were familiar to the Romans, though not attended with all the concomitant ideas annexed by our law to this species of estate. In Dig. 30. 114. 14. A prohibition of alienation by will, without cause express, is declared to be invalid. And then it proceeds to say, *quod si liberis aut posteris, aut hæredibus, aut aliis quibusdam personis consulentes, ejusmodi voluntatem significant, eam servandam esse*, and mentions an instance where a father having a son and three grandsons, *fidei commisit* to the son, *ne fundum alienaret, & ut in familia relinqueret*. Nothing can be plainer than this authority, to shew that restrictions upon alienating away

(3) Mr. Gibbon's words are—The simplicity of the civil law, was never clouded by the long and intricate entails which confine the happiness and freedom of unborn generations. 4th vol. ch. 44. p. 322. oct. ed.

from a family were valid. I agree with Mr. Gibbon, that this could not be done by *direct* entail, because the Roman heir or devisee (as shall be explained more fully hereafter, under titles by descent and by will) acquired an absolute dominion over the inheritance, without any possibility of fastening upon him *directly* any tack or appendage, in the way either of entail or of remainder; but I cannot agree with that celebrated writer, that this might not be done by way of trust. Under the name of *fidei commissary substitutions*, says Wood (4), and rightly in my opinion, were comprehended not only trusts, but entails and remainders. The method was this; though no such shackle could be put, as we have said, *directly* on the heir, yet the estate could be left to him upon trust, that he would at his death leave it to another, and so on, by way of what was called *substitution*, and the person thus substituted corresponded to the issue in tail or remainderman with us; this being done, however, merely under the principle that each possessor for the time being held only in trust to hand over, by some direction of his, when his time of enjoyment should be at an end, the estate to the next entitled, therefore these limitations of estate were not called by any term synonymous to entails or

(4) In a note, p. 140. 8vo. ed.

remainders, but comprehended under the general head of *fidei commissa*, or trusts (5).

(5) TRUSTS.

Trusts were first introduced at Rome, in the time of Augustus, for the sake of those that could not have been devisees or donees, according to strictness of law, as for example, aliens. The estate therefore was conveyed to a citizen, who was the direct heir, the *fiduciarius* or trustee, on trust to deliver over the inheritance to the *fidei commissarius*, or cestui qui trust, or to let him receive the profits, and as the execution of these directions, depending on the honesty of the trustee, was not sufficiently enforced at first, a prætor was appointed expressly for the purpose of forcing the trustees to fulfil the trusts.

Mr. Gibbon insists, that the doctrine of trusts went no further at Rome, than the simple form above mentioned, and that such *fidei commissary substitutions* as are relied upon in the text to prove the Romans had what may be called trust entails, are of modern invention, feudal ideas grafted on the Roman jurisprudence, and derived from an abuse of the 159th Novel. which he calls a partial perplexed declamatory law. It is well known that Trebonian was accused of corruption with regard to the enacting of that law, (which took the decision of a family dispute out of the ordinary courts of justice), and that he is supposed therefore to have enveloped it in studied obscurity. But still enough, in my opinion, appears in that law to shew, that *fidei commissary substitutions* were then, and long before, usual. The case was briefly this; A. had left an estate by will, with a prohibition of alienation out of the family; after four decedents a part of it was alienated: the son of that descendant insisted on the will. The law decides, that in that

Estates for life.—Estates for life are divided by Judge Blackstone into those created by act of the parties, and those created by construction, or operation of law. Of the latter kind I do not find any among the Romans. T. in tail after possibility, is a creature of our own law; and tenant by the curtesy adds to his definition the words of *England*. With tenancy in dower, Blackstone has himself observed, the civil law was unacquainted. In it therefore we shall only find mention of *conventional* estates, or leases for life; and and on these it has said very little, because, though the Romans had such terms, they were not usual, their lands in general being set only for very short terms of years.

Estates for years.—The terms for years among the Romans were then, as we have observed, extremely short, like the modern tenures in France and Switzerland (6). No term is more frequently

particular case, the testator's meaning was not to entail the prohibition of alienation beyond his own children, *i. e.* the first degree; but that at all events, and in all cases, it could not be extended beyond the fourth degree.

(6) In France, says Gibbon, all leases of land were determined in nine years, until this limitation was removed so lately as the year 1775; and adds, that he is sorry to observe that it still prevailed in the beautiful and happy country where he then resided, in Switzerland. Gibbon's *Decline and Fall*, &c. chap. 44. in a note. Leases in China are not usually longer than seven years. Lord Macartney's *Embassy*, vol. 2. p. 505. The reader will observe, that

mentioned than the quinquennium, or term for five years, inasmuch as to induce some persons to imagine that the power of leasing was restricted to that period by law, though Mr. Gibbon rightly supposes it was only by custom (7). To estates for years, therefore, their most usual mode of leasing, I shall confine a short account of such incidents to leases, as I have been able to glean

though I have, (in Mr. Blackstone's method, and to conform as much as possible to the genius of the English law), considered leasing and hiring of land separately and detached from other hiring; yet the civil law considers all hiring, whether of lands, houses, animals, or other moveables, or even of personal labour, all together under the class of contracts, and under the one head of *locatio*, hiring or letting to hire.

(7) From these observations of the shortness of their leases, must be excepted their *emphyteuses* or *fee-farm* leases. They originated in the same cause which produced our leases so common in Ireland for lives renewable for ever, in the barrenness of certain lands, which on that account no person would take or improve on a short lease; indeed the *emphyteusis* of the civil law is expressly held by celebrated writers to have been the parent of the English *fee-farm*, and by some even of our copyhold estates; and I apprehend the Romans actually had leases for lives renewable for ever. The *emphyteuta* was so called from being obliged to plant and improve the land; he could mortgage and alienate, but if he sold, the landlord had the first option as a purchaser, which was called *Jus Preemptus*. If he assigned, he paid a relief, which was called *Laudimium*. See Cod. 4. tit. b. 8. ch. 3.

from the dispersed and extensive fields of the civil law (8). Their law of emblements was very similar to ours, and founded on a like principle of sound reason, that where a man knows the expiration of his time, it is folly for him to act as if he did not. This I think appears clearly from Dig. 19. 2, 9. where the case is put of a lease for five years, provided A. so long lived, expiring upon the death of A. and it is declared that if the lessee had done acts *quasi quinquennio fruiturus*, he must suffer for it, because *hoc evenire posse prospicere debuit*.

Mr. Gibbon has represented the interest of the lessee or colonus, as miserable and precarious, and so it was in many respects, but not quite so insignificant or trifling as he represents it. He

(8) If this account appear superficial to the English lawyer, it is because he is not acquainted with the difficulty of deriving from books *alone* at the distance of one thousand and two hundred years, any thing like a complete system, where he is to expect aid only from detached fragments, hints, and allusions to practices and usages perfectly known at the time, and therefore imperfectly explained; and where he perhaps does not find a subject treated of under one distinct appropriate head, but dispersed up and down under a thousand, often apparently foreign to it.

On the particular subject of their leases for years, we must also observe, that another difficulty in obtaining information arises from their being as little respected, noticed, or mentioned among them, as such tenures were among us before the reign of Edward I.

says, no solid or costly improvements could be expected from a farmer, who at each moment might be ejected by the sale of the estate. Now true it is, that if the lease did not mention assigns, the purchaser was not bound by the lease (9), but then the lessee could come upon him for the loss he suffered by the breaking of the lease, and the vendee had his remedy over against the vendor. And as to improvements, he was not under the discouragements he would be with us, for he had a right to be reimbursed for all *reasonable* improvements.

If we add to this, that the landlord was bound to repair, and was in general obliged to advance the stock and improvements of husbandry (10),

(9) It must be remembered, that in the early periods of our history, a landlord could at will extinguish all leases for years upon his grounds, by suffering a common recovery.

(10) These provisions, so apparently reasonable, and so necessarily arising from the short tenures of the Romans, afford other points of comparison between the English and Roman laws. One great use of the study of other laws is, to see whether any, and what changes would be advisable to be introduced from them into our laws. It is true, that it would be ridiculous to suffer every mad experimentalist, or expensive improver, to load a farm with charges which the landlord might never be able to redeem, or to break his contract at pleasure. But how irksome is it to a tenant to see another derive all the benefit from the value he has added to the estate, and how often do we see a lessee in vain praying to be discharged from a bargain become intolerable by unforeseen events?

and that the lessee could relinquish his bargain if he found it disadvantageous; the situation of the lessee for years, was by no means as bad as it was originally in these countries.

The 19th book of the Pandects, title 2d, and the 4th book of the Code, tit. 65, contain the usual implied legal engagements between lessor and lessee; from its perusal we learn that the lessee was to use the land carefully, and as a good owner should, and to pay the rent, and surrender the premises uninjured, at the end of the term: he might let to others, but was answerable for the acts of his under-tenants, as he was for those of his servants. He was not bound to repair, except by special covenant or by custom (11). He was

(11) In Ireland, a covenant binding lessee to repair, is almost universal in leases. In England, a landlord repairs where there is no lease, and very often chuses to do so when there is, from regard to the neatness of his estate. Though there be no particular covenant to repair, yet lessee for years is answerable for waste in general; and to let the house fall down would be waste. 2 Bl. Com. ch. 18. 1 Ves. 462. Lessee who covenants to pay rent, and to repair (accidents by fire excepted), though the premises are burnt, and not rebuilt by the lessee after notice, continues liable to the payment of the rent. 1 T. R. 310. The civil law would have determined to the contrary. T. for life without impeachment of waste, shall not be allowed to commit *destruction*, as by wantonly cutting down ornamental trees out of enmity, perhaps, to him in remainder, 2 Vern. 738. 1 Brown, 166. 3 Bro. 549.

obliged to quit a house leased if the landlord really wanted it for his own habitation, and was bound to a temporary relinquishment of his holdings, if the landlord wanted the possession for the purpose of repairs. If he made improvements or repairs, he was to be reimbursed. If evicted by a stranger, or if the possession was disturbed by the landlord himself, rent was extinguished or suspended, and lessor liable to make good all the damages which the farmer sustained, and all the profits he might have made. The T. was discharged from rent, if by any extraordinary event arising from tempests, or from an enemy, he was prevented from enjoying and reaping the crops. But if the accident was of an ordinary nature, or the damage received in the common course of things, as from pernicious weeds in corn, or from the too great age of worn-out vineyards, which are the instances put in sec. 15. lib. 2. 19 Dig. the lessee was not discharged from paying his rent: so if the damage, though done by a voluntary trespasser, was slight. If landlord had remitted the year's rent to his suffering tenant, and that tenant, by the unusual fertility of the succeeding year, had amply compensated the loss of the former, the remission was done away, and the tenant became again subject to the rent: it scarcely need be said that all these regulations might be altered and modified by special covenants, which might render the tenant liable to all losses, and exposed to all chances of events.

The emphyteuses, which were leases for ever, or for long terms of years, differing entirely in their nature from the short five years leases to which our observations have been hitherto applied, the principles applied to them were totally different; the emphyteuta was bound to improve, he therefore got no abatements, as the conductor (which was the name for the ordinary lessee for short terms) did for extraordinary calamities. But in return he had the extraordinary privilege of relinquishing his bargain, if he found it disadvantageous.

He too might mortgage and alienate, which the conductor or usufructuary could not: in fact, the conductor was not considered as having any property in the land, but merely as having a title to the enjoyment of the fruits and profits, whereas the perpetual tenant was considered as having the *utile* dominium, while the *direct* property remained in the landlord: and hence, in the Roman law, the perpetual tenant is considered in a double capacity, either as or as not being the master of the estate, according to the different lights in which he and the property are viewed (12).

(12) I have insensibly fallen here into the use of the terms landlord and tenant, as Domat and others have done, though the Romans, not having the doctrine of tenures, lessor and lessee are the more proper terms.

T. at will and by sufferance. The Roman law resembled ours, in striving as much as possible to construe tenancy at will to be holding from year to year. In the same manner, if the tenant held over after the term expired, and the landlord did not immediately take legal steps to remove him, or seemed in any manner to acquiesce, his silence was construed to be a tacit renewal of the lease—and the lessee could not be turned out without regular notice; he became tenant from year to year, or sometimes for two years certain; for instance, if there was an inequality in the produce, which made every second year more valuable, his lease was tacitly renewed for two years (13); and under some special circumstances he might thus tacitly become entitled to a term as long as his

(13) Our law nearly agrees in all these particulars. See 3 Burr. 109. Espinasse, 469. Upon the whole, however, it must be acknowledged, that the Roman lessees seem much to have resembled the Metayers in France, to whom the landlords furnished the seed and implements of husbandry, and shared in the profits; which, says Mr. Young, in his tour through France, promises well, but succeeds ill. Lord Kaimes * observes, that it is believed to be the universal opinion, that without a long lease, it is vain to hope for an improving tenant; and though confidence may supply the want of long terms, yet, says Adam Smith, in his *Wealth of Nations* †, perhaps England is the only country under Heaven, where a tenant will improve, and even build, without any lease whatsoever.

* Gentleman Farmer, p. 407.

† 2 Vol. book 3. p. 174.

former one. Though, on the contrary, this tacit renewal might be for less time than a year, from the nature of the subject, e. g. of a wine press to the time of vintage. Such an implied renewal revived all the conditions in the former lease—it was a continuance of the first lease with all its consequences.

CHAPTER IV.

OF ESTATES UPON CONDITION.

OF these the principal and most remarkable being mortgages, I shall chiefly confine myself to them, previously remarking only, that in every law the scholar must naturally expect to find mention of conditions express and implied, precedent and subsequent, and of estates dependent upon them accordingly. They arise necessarily from the nature of things, and the commerce of men; but the civil law not having adopted certain subtle distinctions, which in ours make the *particular* consideration of such estates incumbent upon us (such for instance as between a condition in deed and a limitation) does not dwell with any peculiar attention upon such conditional estates, save upon mortgages, though it is by no means silent as to conditions in the abstract (1).

Mortgages were so well known to the civil law, that many allege, as Mr. Fonblanque has ob-

(1) It views them under the head of covenants, which will come under our consideration in the third book.

served, that our own doctrines upon the subject are borrowed from that comprehensive code. Without determining that question, we shall find many things relative to them in its regulations worthy of observation.

The pignus & hypotheca of the civil law are said, Dig. 20. 1. 5. 1. to differ only in name, yet in other places, and as Wood says, in propriety of speech, the pignus is of things moveable, the hypotheca of things immoveable, like the usual distinction of a pawn and a mortgage with us. Yet Blackstone, Com. vol. 2. p. 159. (2) and Mr. Powel, in his Treatise on Mortgages, make the distinction be, that when actual possession passed to the creditor, it was a pignus; when the possession remained with the debtor, it was hypotheca, analogous to our discrimination between the mortgagee in and out of possession, in which they are supported by Dig. 50. 16. 238. 2. and Inf. 4. 6. 7. (3). Mortgages were divided into

(2) Mr. Powel gives his opinion, that mortgaging (though by some thought to have originated with the Jews) *as practised with us, seems to owe its introduction more immediately to the civil law*, which distinguished between pledges and things hypothecated. Mr. Butler seems to differ, and says, they were rather introduced on our common law doctrine of conditions, an observation which Mr. Fonblanque truly says, at least cannot apply to the equity of redemption.

(3) The former authority however adds, *quidam putant pignus proprie rei mobilis constitui; and the latter says, pignoris appellatione eam proprie rem contineri dicimus quæ simul etiam traditur creditori, maxime si mobilis sit.*

conventional, prætorian, and judicial (4); but the first only correspond to our mortgages, and therefore are alone here considered; the two latter mean what we call executions, or would term liens upon an estate; they were called also tacit pledges.

It was not necessary that the mortgage should be in writing, and as this naturally left an open for frauds, by secretly remortgaging the same thing, three witnesses latterly were required, and if the debtor had not sufficient to pay the second debt, the creditor might prosecute him for the crime of *stellionate* or fraud, because he did not give him notice of the precedent mortgage. Dig. 13. 7. 36. 1.

By the civil law, says Mr. Fonblanque, the mortgage was properly a security only for the debt itself, for which it was given, and the consequences of it, as the principal sum and interest with the costs and damages laid out in preserving it, and did not involve such effects as that the heir of a mortgagor also indebted by bond to the mortgagee, should not redeem without also paying the bond debt, and such like provisions known to our courts of equity (5).

(4) *Et sine scriptura si convenit ut hypotheca sit, & probari poterit res obligata erit.* Dig. lib. 20. tit. 1. sec. 4. See C. 8. 18. 11.

(5) He quotes Dig. lib. 13. lib. 7. sec. 8, I think he is mistaken, and am supported by Code 8. 27. 1. which says directly the contrary, *si in possessione fueris constitutus,*

The twentieth book of the Digests, and the eighth of the Code, furnish our knowledge of the civil law upon the subject of mortgages: all things which might be bought or sold (which things were said to be in commerce), might be subject to a pledge or hypothec, lands, houses, moveable goods, debts and actions (6), and other rights, Dig. 20. 19. but tools, and implements of husbandry, could not be hypothecated, Code 18. 17. 8. and the dotal farm of a wife could not be mortgaged, even with her consent.

The mortgagee might have, by agreement, the profits of the property pledged, for the interest of his money, which was called *pactum antichreseos*; but the mortgagor, though he might covenant, that on failure of payment the property should be sold, yet was not by law allowed to covenant, that it should be absolutely forfeited to the creditor, who might otherwise, taking advantage of his necessities, get possession of a large property mortgaged for a small debt. See Dig. 20. 1. 11. 1. and Code 8. 35. 3.

The mortgagor might indeed covenant that his creditor, on failure of payment, should have the thing mortgaged at a fair valuation, repaying the

nisi ea quoque pecunia tibi a debitore offeratur vel reddatur, quæ sine pignore debetur (quam mutuam simpliciter accepit) restituere non cogeris, &c. &c. Nor does the Digest quoted by him say it shall be security for *nothing more*.

(6) Our law differs as to debts, actions, or choses in action; they cannot by ours be transferred.

difference, if the value exceeded the debt, and the mortgagee could not be legally bound by any agreement not to sell at all.

The law therefore considered three cases, and provided accordingly: 1. Where a power of sale had been included in the original mortgage. 2. Where it had been expressly excluded. 3. Where there was nothing mentioned upon the subject. In the first case, no notice was necessary to the creditor before the sale; in the second, the thing might be sold, but three notices were to be given, at certain stated intervals: in the latter, notice was to be given, and two years must have elapsed from the time of that notice, before the sale could be made (7); but in none of these cases does it appear to have been necessary to go into any court, or to apply to any magistrate to authorize the sale, which was done by the private authority of the creditor, and the implied consent of the debtor (8). All these cases

(7) Mr. Fonblanque says, no rule appears to have prevailed in the civil law restrictive of the time of redemption; he must mean no such rule as is adopted by our courts of equity, of length of time being pleadable in bar of redemption, but he does not mean that he could not be foreclosed in the manner in text.

(8) Mr. Powell says, that the pignoratitious action was against the person of the debtor, to foreclose him, when the pledge was already in the possession of the creditor. Mr. Powell is certainly mistaken in thinking, that any such action was necessary to enable the creditor to sell, or that

suppose a time of payment appointed, but if no time mentioned, the thing might be sold immediately; here, however, reason and a prætorian court would have intervened, and obliged a reasonable delay. See Dig. 13. 7. 18. and Code 8. 28. 4. and 34. 3. and Instit. quibus alienare licet. If the mortgagee had been in possession, or in any way recovered his debt out of the rents or profits he could not sell; if he did, in such case the sale could be rescinded or not, according as the buyer was or was not conscious of the fraud.

Pledges or mortgages were also divided into general and particular. In a general mortgage of a person's whole property, things absolutely necessary for the support of life, did not pass, Dig. 20. 1. 6. 7. but it extended to all future acquisitions, even without any express agreement, Code 8. 17. 9. If a particular thing was pawned, everything

he had occasion to apply to a court, nor was the pignoratitious action of that nature at all; it was properly an action given to the debtor against the creditor to recover the pledge, the debt being satisfied; and though the creditor had a contrary action of the same nature, it was for very different purposes, as shall be shewn in the sequel. In some cases, however, the creditor seems to have been obliged to apply to a court of justice for power to sell, when the debtor could not be found, so as to be served with proper notices of sale, Code 8. 34. 3. and it should seem as if he might, if he pleased, make a voluntary application to a court in any case, if he preferred that method to the one by private notice, from the language of Code 8. 34. 3. *de jure domini impetrando*.

that was the product, or part of it, if it continued in the same state, and was of the same nature, was contained in the obligation (9). If possession was not given, all the property of the debtor was impliedly pledged to prevent frauds on his part in selling the thing mortgaged, Dig. 20. 1. 13. The mortgagee in possession was obliged to answer not only for gross, but even light negligence, but not for the lightest fault (10). But he was not bound to answer for inevitable accidents, unless they were occasioned by his means; he was to account for the profits, and if he had been satisfied out of the profits, the mortgage was at an end, and the possession might be redemanded. The mortgagor was obliged to allow in account, all necessary expences laid out on the premises, but whether improvements should be allowed, depended upon circumstances. In general, those which really increased the value of the estate were, merely ornamental were not. The first money paid the creditor was applied in discharge; first, of the interest, and afterwards of the principal; and in case of a sale, if moveables and immoveables had been pledged, the moveables were to be sold first, and if sufficient to pay the debt, the immoveables were not to be touched: the only instance almost of any distinction in the civil law resembling ours, between real and personal

(9) See 1 Atk. 477.

(10) As to these distinctions, see Jones on Bailments.

estates (11). Special pledges also were to be sold before general ones.

Another division of mortgages or pledges was into express or tacit. Tacit were those interests of the exchequer in the goods of the subject, as security for the public taxes—of the landlord in the thing leased for his rent—of the pupil in the property of his guardian—of the wife in the goods of her husband to the amount of her dowry—of the repairer of a house in the house repaired, with some few others of less note. It is observable, that the case of a master of a ship-contract is not mentioned, though it has been said (12), that every contract of the master tacitly binds the ship, and argued by analogy from the repairer of a house, but Gail denies the analogy.

The mortgagee out of possession might, on failure of payment, obtain possession by the hypothecarius action: the mortgagor, when possession had been delivered might (on the debt being paid or satisfied out of the profits) reclaim it by the pignoratitious action; a counter pignoratitious action was given to the creditor, where the pledge having remained in debtor's hands, the creditor could not recover it, but sued for the value; the mortgage was affected by the privileges of certain creditors, as if money was lent to build

(11) See D. 50. 17. 23. 13. 7. 8. and 35. Dig. 42. 1. 15. 2.

(12) 2 Lord Raymond, 805.

or repair a house which was afterwards mortgaged to another, the lender had a tacit lien or pledge on the house, and was preferred to the express mortgagee; so the landlord's claim of rent was preferred, but the claims of the exchequer had no such privilege of being preferred to a mortgage, though they were to a simple debt, and the mortgage debt also took place of many claims which had privilege of other debts, such as funeral expences, &c. (13) these not being considered like those above-mentioned to be tacit, but direct liens upon the mortgaged property.

The fourth title of the 20th book of the Pandects, and the 18th of the eighth of the Code, treat of the order and priority of mortgages; the cases put are many and various, and do not seem materially to differ from the provisions of our own law. A subsequent mortgagee could of course receive nothing, till a former had been paid his principal, interest, and costs but he might buy off the former, and so protect or confirm his own title (14). We have before observed, that a mortgagee might tack another incumbrance to his mortgage, and if he lent more money by way of further charge on the estate mortgaged, he was preferred as to this charge also, before a mortgagee created in the intermediate time (15). Dig.

(13) See Dig. 20. 2. 1. & 11. 7. 45.

(14) See 2 Vent. 337. 2 Vern. 156. 1 Bro. 63.

(15) Compare this with the case of *Fraine v. Cole*, in chancery, 1783, cited by Mr. Woodeson in his *Lecture on Mortgages*.

20. 4. 3. In some cases the subsequent mortgagee was preferred, e. g. if his mortgage had been made for the preservation of the pledge itself, as for the repairs of a ship, if that had been the security (16); in the 16th section of the 4th title, 20th book of the Digests, a case is reported of a third mortgagee, who having defeated the first in a suit, and proved the weakness of his claim, claimed therefore himself priority to the second, who had been no party to the suit; it does not seem very reconcileable with the wisdom of the civil law, to have stated it as a serious question, but it serves to shew that this species of property seems to have been as productive of controversy with them as among us.

To enter more into detail upon their law of mortgages would be foreign to my present plan. I shall conclude with observing, that the assignment of mortgages is frequently mentioned, under the name of subrogation or cession, and that a second mortgagee could not sue without satisfying the former (17).

(16) Hypothecation of ships is by the civil law.

(17) Mr. Fonblanque, in a note on book 3. ch. 3. of the Treatise of Equity, observes, that the position laid down by Lord Hardwicke, and now undisputed (viz. that a third incumbrancer, without notice of a second, taking in the first, shall have satisfaction before the second), could not hold in any countries but these, because the jurisdiction of law and equity is administered in different courts, yet I think it held at Rome in the same court. I should hesitate long before I controverted the authority of

Mr. Fonblanque, if this be controverting it, for perhaps he speaks of modern Europe only; his respectability is deservedly considerable, and every lawyer has experienced the utility of his commentary; but I am supported, I think, by Heineccius, in his comment upon the 20th book, 4th part of the Pandeets, *Qui potiores in pignore*, where he says, *hypothecarium posteriorem priori, sive volenti sive invito solvere vel offerre pecuniam, posse; eo facto jus omne pignoris, immo ipsum jus prælationis, in ipsum transferi, &c.* The reader must be aware, that I could load the work, like Dr. Ayliffe, with an infinity of questions in the civil law between mortgagor and mortgagee, or the assignees of each, as well as between two mortgagees, where first brought by the latter to an account, if I thought they could afford either amusement or instruction to the modern lawyer. The civil law of mortgages is much referred to in Ryall v. Rowles. 2 Vesey, p. 169.

CHAPTER V.

OF ESTATES IN JOINT TENANCY, COPARCENARY,
AND COMMON.

OF REMAINDERS AND REVERSIONS.

UPON the subjects of this chapter I shall have occasion to say very little, for a reason very well and briefly expressed by Mr. Woodeson, when he is speaking of the refined speculations of the civilians upon the nature of contracts, which is, that the thoughts of the Roman jurists were not immersed and entangled like those of the early lawyers of this country, in metaphysical and abstruse subtilties, applied to landed estates. We shall find therefore among them, none of the metaphysical distinctions between the seisin of joint tenants and tenants in common, nor any elaborate niceties about vested and contingent remainders. Joint estates of necessity they had: as all property gavelled, the takers by descent, of course, were coparceners. Of tenancy in common, little mention is made (probably because

they considered it too plain a subject to require illustration) enough however to shew us, that it was favoured with them, even more than with us; for, strictly speaking, joint tenancy could not, by the civil law, be created by deed or inter vivos at all, but only by will.

The points to which they have chiefly attended, are the *jus accrescendi* and the right of partition; the *jus accrescendi*, is the very same term which is applied to the right of survivorship by our ancient lawyers (1). This *jus accrescendi* had place between coheirs, and between joint devisees or legatees, but not in services, nor among merchants, nor in donations or grants inter vivos, except they flowed from the emperor, nor in substitutions in trust, but in direct substitutions it had (2).

(1) See 2 Black. Com. p. 193. and Mr. Christian's note thereon.

(2) See Code 10. 14. Dig. 32. 3. 89. Code 4. 37. 3. Though there was *jus accrescendi* between legatees, this only means where one died before testator, or would not accept his part, for if both outlived him there was no survivorship between legatees, and the same is our ecclesiastical law. See Swinburne, part 1. sec. 7. and 2 Lev. 209. our law agrees as to merchants.

A. makes two executors, B. and C. appointing them residuary legatees—B. dies, the whole shall survive to C. Cray v. Willis, 2 P. Williams, p. 529.

The action *communi dividundo* lay by one joint tenant, or T. in common against another, to oblige him to divide the joint property, which was called *rei communio*. But if the holders of the joint estate were coparceners, or coheirs, their remedial action in this case was called *familiæ erciscundæ*. See 3 Inst. tit. 28. If a thing could not conveniently be divided, the whole might be adjudged to one, he paying the other the value of his part; or if matters could not otherwise be settled, the whole must be exposed to sale. Code 3. 37. 1. and D. 3. 4. 5.

If the united property was in unequal shares, the greater share might be charged with a service to the other, D. 2. 10. 22. 3. and every share stood as a warranty to the title of the others. C. 3. 36. 14.

The title deeds of an estate in common, might be ordered by the judge to be left with him that had the best part, and that the others should have authentic copies, or if all had equal interest, the judge might nominate a person to keep them safely in his custody. Dig. 10. 2. 5.

REMAINDERS AND REVERSIONS.

In strictness, or by any direct mode undoubtedly, as we have repeatedly observed, there could be no such thing either as entails or remain-

ders(3). Nor did the usual substitutions signify any thing similar, they were vulgar or pupillary, the vulgar substitution signifying the appointment of a substitute in case the heir at law, or original devisee, would not accept the heirship; the other providing, that in case a minor son would not accept the heirship, or having done so, should die under age, the appointee of the father should come in his place; to which may be added, the quasi pupillary, differing from the last only in its object, being an idiot or lunatic, whether minor or not. But I am supported by Mr. Wood and the French

(3) In thinking that they could even indirectly, I have to combat not only Mr. Gibbon, but Dr. Adam Smith, who, on the *Wealth of Nations*, book 2. ch. 3. p. 166. treats with contempt these fictions, as he supposes them, of the French lawyers; he says, neither fidei commissa, nor substitutions, resembled entails. Dr. Halifax is at issue with him, for he says they did.

I think I have conceded too much to my respect for Mr. Smith and Mr. Gibbon, by granting in the text that pupillary substitutions did not resemble remainders; in some instances surely they did; what is a devise to a son, and if he die under age to a stranger, but a contingent remainder as to the latter? and did not the famous case of *Curius and Coponius*, argued by no less men than *Scævola* and *Craffus* (which Lord Mansfield has peculiarly noticed) respect a remainder: That was a devise to a child with which the wife was supposed to be pregnant, and if such child died under age, then a devise over. *Cic. de Oratore*, lib. 1. *Burr.* 1623.

jurists, in thinking that fidei commissary substitutions, often corresponded to our remainders, and what I consider much more than either, I think I am supported by passages in the Code. The Pandects, lib. 28. tit. 6. sec. 23. speak of cross remainders, *qui plures hæredes instituit ita scripsit, eosque omnes invicem substituo*; but what I chiefly rely upon is, the 6th book and 42d title of the Code; there, among other things, this case is put, *si frater tuus postquam patri hæres extitit, pubes jam factus decessit, ex pupillari substitutione tibi hæreditas ejus delata non est. Sed si verbis fidei commissi aliqua parte testamenti confirmata est, fidei commissum ab hæredibus petere non prohiberis.*

Now since, as Mr. Gibbon says, the power of the testator expired with the existence of the testament, and the heir who accepted acquired an absolute dominion over the property, how in this case could the brother have succeeded but as a remainder man, by virtue of the trust created by the father's will?

Reversions, literally speaking, the Romans must have had, but not in our feudal sense of them, nor with their feudal consequences, such as the incidental rights of the reversioner respecting rents, and the peculiar modes of the descent of reversions, which introduce them with us to the particular notice of legal writers.

We have now described the nature and divisions

of things, and the several kinds of estate or interest that might be had in them. We shall proceed in the ensuing chapter to consider the titles to things; not first to things real, then personal, as Sir William Blackstone has been forced to do by the genius of our law, but according to the mode of the civil, to both together—to things in general.

CHAPTER VI.

LAW OF DESCENTS.

THE Roman law of descents is worthy of our attention, as our rules respecting the devolution of personal property have been in a great measure borrowed from it, and as it has been frequently resorted to in our municipal courts, in controversies respecting distribution and administration. (1).

(1) That the statute of distributions has been copied from the civil law some have denied; but Lord Hardwicke, in the case of Wallis and Hodson, 2 Atk. 115, expressly says, what the master of the rolls (Prec. in Chancery, 594.) had said before, that the statute of distributions is to be construed by the rules of the civil law. Upon this subject then no one will deny, that a knowledge of the civil law is useful and necessary.

That this celebrated statute was prepared by a very eminent civilian, Sir Walter Walker, every one knows; but Sir Wm. Blackstone has chilled a little our spirit of enquiry, by coldly saying, that it bears some resemblance to the Ro-

But before this law can be perfectly understood, it will be necessary to explain (what has been frequently before alluded to) the nature of the Roman heir or heirship. The meaning of an heir, in the civil law, was very different from the signification of the word in ours ; they applied the name both to him who took by descent, and to him who took by will, and to the heirship by descent, annexed ideas utterly unknown to our law. Their singular conception of an heir was this, that he was one and the same *person* with the deceased ; that he represented him *personally* ; and his representing him, with respect to subjects of property, did not more or less enter into the Roman notion and definition of an heir : the succession was considered not as a right of succeeding to *property*, but of succeeding to the person deceased, of coming in his place and representing him. The person own-

man law of successions, *ab intestato* ; however, as he subsequently acknowledges, that the doctrine and limits of representation laid down in the statute of distributions, seem to be chiefly borrowed from the civil law, we have no occasion to be discouraged in the pursuit, and may perhaps impute this seeming reluctance to admit the received opinion, to an anxiety to do honour to the ancient English law. See Black. Com. vol. ii. ch. 32. The reluctance of that learned judge to admit our debts to the civil law frequently appears, they are no where more manifest than in the *donatio mortis causa*. Yet even as to that he only says, that it *seems* to be borrowed from the civil lawyers, and he shews the same jealousy as to the *collatio bonorum*.

ing the estate was like a corporation that never dies; he was supposed to be one and the same; and this extraordinary idea of an heir is ingrafted into the Scotch law, and is the parent of many consequences therein. This may be illustrated by consulting Lord Kaimes's *Law Tracts*, a work much superior to his *Principles of Equity* (2).

Dr. Christian, in a note on the second volume of Blackstone's *Commentaries*, very well and briefly explains the Roman heirship: the civil law, says he, considers father and son as one person, so that upon the death of either, the inheritance does not so properly descend as continue in the hands of the survivor.

From this principle many curious corollaries followed. We have already mentioned, that the ancestor could not directly entail the estate or name a remainder man, though he might by the circuitous method of binding the heir in shape of a trust; this followed from what has been said, for the inheritance being entirely the heir's, and perfectly in his disposal, any future heir now named by him, took place of any other heir formerly

(2) With a view to these principles, it is said, 2 Vesey, 91, an executor was an heir by the old Roman law; but this I think leads to error, for an executor may be without any beneficial interest—a mere manager of the property, and trustee for others, an idea unknown to the Romans till introduced by the ecclesiastics, sometimes for charitable—sometimes for interested purposes—in late times of the empire.

named by the ancestor, and the power of the ancestor over the property necessarily ceased with his life, and could not be exerted or extended beyond it.

From the same principles followed the celebrated rule of the civil law, "*Nemo mori potest ex parte testatus, ex parte intestatus,*" that a man could not die partly testate, partly intestate, because his representative, from their legal identity, must have all his property; and that the *hæres factus*, or devisee, was not considered so much as taking by purchase as by descent, not as devisee but as *heir*, not indeed natural, but appointed, yet still an heir.

Hence also arose a grand distinction between their law and ours as to payment of debts; the creditors of the deceased could come upon his heir, not only to the extent of the assets he had by descent, but also upon all the property he had in the world, howsoever or from whomsoever he might have acquired it. As this might often be a great hardship, no man was obliged to take by descent as with us, and even a son might refuse to be heir, or he might take a year to deliberate whether he would or not. But in later times, things were put more on a footing of good sense, the heir might make an inventory of the deceased's effects, and by separating them from his own, foreen his other property from debts to which he was a stranger (3). If no person would take the

(3) This whole system, both in principle and practice, long prevailed in Scotland. See Lord Kaimes's *Law Tracts*.

heirship, the owner of property might oblige his slave to be his heir, which was often done in expectation of dying deeply in debt, from a whimsical idea of avoiding disgrace, since the goods then seized by the creditors would be those, not of the extinct master, but of the slave, whose dishonour upon this occasion was always compensated by the donation of freedom; heirs therefore were *either necessarii*, as the slave just mentioned, or *sui et necessarii*, as the sons of deceased (the latter epithet being added, because they could not be excused without application to the prætor), or *extranei*, strangers, who were at perfect liberty to act or not, as they thought fit (4). Having thus explained the heirship of the civil law, and having observed that the Roman law of descent is so far interesting to us, as it gave rise to our law of succession to personal estates and order of granting administration, and furnished hints for our statute of distributions (5), it seems superfluous

For the Roman law of heirship, see *Institutes de Successionibus ab Intestato*.

(4) Monsters could not be heirs by the civil law, nor bastards, to the father's inheritance, but they might to the mother's; indeed, if the father had no lawful wife or child, the bastard with his mother succeeded to one-twelfth each. Nov. 89. ch. 8 and 12. Cod. 6. 59. 5. Ff. 1. 5. 14.

(5) Dr. Christian observes, that though it is said that the canon law computation has been adopted by the law of England, yet he does not know a single instance in which we have occasion to refer to it; but that the civil law com-

to go further in delineating the civilians' canons and rules of descent, than their ultimate establishment and ordination by Justinian (because their situation at that period alone has been regarded by our laws), without reviewing those perplexed and intricate changes which they passed through antecedently to his reign. I shall, however, subsequently point out some of the principal of these to the reader's attention.

The canons of descent or succession adopted by the civil law differ from those of our common law, as to real estates, in almost every particular, as will appear by the following comparison.

First, All property (whether what we call real or personal) gavelled and descended equally among all the children of the deceased, both male and female, without regard to primogeniture or sex, with representation *ad infinitum*. Nov. 118. ch. 1. and Nov. 22. ch. 29. See also Wood.

Secondly, The right of inheritance could ascend as well as descend; the rule was defended by the obligations of the child to the parent, as well as by the supposition of the estate having often proceeded from his bounty: better reasoning at least than Lord Coke's in support of the contrary doctrine, viz. that *gravia deorsum tendunt*.

putation is of great importance in ascertaining who are entitled to administration, and to the distributive shares of an intestate's personal property. Note on 2 Black. Com. ch. 14. p. 208.

Thirdly, Whereas real estates with us always go per stirpes; at Rome, all property whatsoever descended, sometimes per stirpes, sometimes per capita: in the direct descending line always per stirpes; and so among collaterals taking by way of representation, where any person (6) of equal degree with the person represented still subsisted; but if all took in their own rights, they took per capita.

Fourthly, In their method of computing degrees, they reckoned not as we do from the common stock downwards, to each of the persons related, or to the most remote of them, but from the person *a quo* upward to the common stock, and then downward again to the other party related; a distinction between their law and ours familiar to every lawyer (7)

Fifthly, No such rule as that on failure of lineal descendants, the inheritance shall descend to the blood of the first purchaser, nor any consideration had, whether the estate first came by father or mother's side.

(6) Nov. 110. c. 3. Inst. 3. 1. 6. A brother and two nephews of deceased took per stirpes; but if no brother alive, the children of brothers would take per capita. See Walsh and Walsh, Prec. in Chan. 54. and 2 Bl. Com. 217. octavo, and *Davers v. Dewes*, 3 P. Wms.

(7) Thus, by our law, first cousins are in the second degree, by the civil law in the fourth, viz. to the father one degree, to the grandfather two, to the uncle three, to his child a cousin four.

Sixthly, The half blood was not excluded, though postponed to the whole, as we shall see hereafter.

Seventhly, The agnati, or relations by the father's side (8), were not preferred to the cognati, or relations by the mother, though they had been so until the distinction was abolished by Justinian himself, and rightly, says Sir Wm. Blackstone, because as the Roman law gave no preference to males in lineal succession, there was no reason for preferring them in collateral (9).

(8) I bow to Blackstone, Ellis, and Wood, in interpreting agnati to mean relations by the father's side, yet I think that was not always the meaning. Heineccius interprets them to be *per virilis sexus personas conjuncti*; Gibbon calls them persons connected by a line of males. According to these distinctions, I should suppose that the son of a father's aunt should be a cognate, not an agnate; and in the second of the Institutes, the son of a sister is specially transferred from the cognates to the agnates.

The cognates were preferred to the Gentiles: by the Gentiles were meant those of the same general family united by one common name, a *gens like a tribe or clan*; the nomen marked the gens; the cognomen or surname the particular branch of that family. Caius Julius Cæsar was of the Julian family, and of that branch of it called Cæsars; the Julii were gentiles to him, the Cæsars agnates. To Publius Cornelius Scipio, Publius was the prænomen corresponding to our christian name, Cornelius the name, Scipio the surname, i. e. he was of the Scipio branch of the Cornelian family: sometimes an agnomen was added, as to him Africanus. The wife took the husband's name as with us.

(9) Sir William seems to forget that, in collateral, the relations by the female line would even at Rome carry their

Having thus shewn how very different their canons of descent were from ours, I proceed to sketch the method in which they searched for the heir of an intestate, or the successor to his estate.

1. In the first place succeeded all his children, by equal portions, with representation ad infinitum, without any respect to primogeniture or preference with regard to sex.

2. If no descendants, the father and mother, brothers and sisters of deceased, by the whole blood, shared his property in equal portions (10).

portions of the estate into another name and family. The Institutes say, "*Commodius videbatur ita jura constitui, ut plerumque hæreditates ad masculos confluerent.*" Lib. 3. tit. 2.

(10) Not so by our law. With us the father excludes not only the mother, but the brothers and sisters: if no father alive, the mother excluded brothers and sisters, until the statute 1 James II. in England, and William III. in this country, admitted them with her. And so the whole ascending line, as Lord Holt observes in the case of Blackborough and Davis, 1 P. Wms. 51. was preferred until the statute of distributions ordained that a nearer collateral should be preferred to a more remote lineal: in that case the grandmother was preferred to the aunt, both as to administration and as to distribution, not because in the ascending line of kin, but because she was nearer of kin according to the computation of the civil law; for, *after the statute of distributions*, her being in the ascending line simply would not have given her a preference.

3. If the parents of intestate died before him, his brothers and sisters, by the whole blood, came in, in preference to his grandfather or grandmother (11).

4. If *some* of the brothers of the intestate by the whole blood survived him, but *others* were dead, leaving children, those children took *per stirpes* their father's respective portions *jure representationis*: but if *all* the brothers and sisters of intestate died before him, the right of representation was not extended to their children; in that case the parents or nearest ascendants living, however remote, came in, in preference to the nephews and nieces of intestate, or any other collaterals (12).

(11) The rule in our law is the same as to personal estate. This is the famous question argued by Voet against Domat and others. Voet's opinion is confirmed by Lord Hardwicke, and established as law with us in the case of Evelyn and Evelyn, 3 Atkins, 762. Same case is reported by Ambler.

(12) We have observed in the preceding note, that the brother was preferred to the grandfather; but it appears by the rule above, that a deceased brother's son was postponed to him, and indeed to any other ascendant, unless there was some other brother still surviving. This seems to be contradicted by Wood, who says brothers and sisters children are admitted with the ascendants in the right line—but I think it is expressly delivered in the 127th Novel. cap. 1. which first gave the right of representation; and after mentioning that brothers children had been by a former law totally excluded, goes on, *Si moriens relinquat ascendentium ali-*

5. No brother or sister by the whole blood surviving intestate, and the ascending line being

quem, & fratres qui possint cum parentibus vocari, & alterius præmortui fratris filios tum cum ascendentibus et fratribus vocantur etiam præmortui tui fratris filii. Upon which Heineccius thus comments: Si soli existent germanorum liberi, illi ab ascendentibus excluduntur; and Sir William Blackstone says, 2 Comm. p. 214, he *apprehends* that, by the civil law, if *all* the brothers and sisters were dead, their children took per capita, not per stirpes, in their own right, and not jure representationis.

Here again, I apprehend, the rule of our law, as to personal estate, agrees with the civil, as in preferring the grandfather to the nephew of the intestate, if all the intestate's brothers are dead, but not otherwise. It does not indeed (since the statute of distributions was made) agree with the civil law, in preferring all the ascendants in such a case to the nephew, because that statute prefers a nearer collateral to a more remote lineal; but that it does agree in preferring the grandfather, who is nearer of kin where the nephew does not take jure representationis, appears, I think, from the case of *Walsh and Walsh*. Prec. in Chan. 54. *Keilway and Keilway*, 2 P. Wms. 344. *Davers v. Dewes*, 3 P. Wms. 40. *Lloyd v. Tench*, 2 Vesey, 213. and *Stanley v. Stanley*, 1 Atks. 455. In this last case, the chancellor says, the words of the statute of distributions do suppose that there must be some persons to take in their own right, and others by way of representation. On the same principle in the case of *Durant and Bestwood*, 1 Atk. 454. an aunt and nephew were decreed equally entitled, because equally of kin, and no representation allowed, no brother being alive. It must be carefully noted, however, that this rule does not extend to cases under the statute of

spent, next came in nephews and nieces by the whole blood, in preference to brothers of the intestate by the half blood.

6. Brothers and sisters by the half blood, and their children, the nephew by the half blood excluding the uncle by the whole (13).

William III. which enabled brothers and sisters to share with a mother. In the same case of Stanley and Stanley, nephews and nieces of intestate were decreed to share with his mother and widow, though no brother or sister of the intestate living.

(13) I have taken these two last rules of succession verbatim from Wood, not being able to satisfy myself from the original authorities, though it seems somewhat difficult to see the reason of them, or to reconcile them with the preceding; for if there was no representation where all the brothers were dead, why should the nephew be preferred to the uncle, any more than he is with us in such a case? Perhaps these rules suppose a brother of the half blood at least to be still living.

Our law here differs, not only in putting uncles and nephews, where the nephews take in their own right and not jure representationis, on a footing, but also in not postponing the half blood, or making any difference between it and the whole as to personal estate. Sir William Blackstone, in his note on this subject to book 2. ch. 32. of his Commentaries, seems not to attend to this preference of the whole blood, or to the narrow limits of the right of representation. Note! it has not been determined that the half blood should succeed equally with the whole under the statute of James II. said by L. C. Wallis and Hodson 2 Atkyns.

7. Other collaterals according to proximity.
8. Husband to wife, or wife to husband (14).
9. The exchequer by escheat (15).

Having thus stated the canons of descent as finally regulated by the novels; it may be requisite briefly to mark how the law stood antecedently in some remarkable instances, which occasion much diversity, even between the novels and the institutes, which were previously published.

By the old law, lineal descendants through a female had been postponed to all collaterals, but latterly had their remedy with the prætor.

(14) With them, therefore, the husband and wife did not succeed to each other; but on failure of all the other relations of each party, and with us as to real estate, they cannot succeed each other at all. But amongst us the husband has an exclusive right to all the wife's personal property, as well as to administration to her, without being obliged to distribute among her next of kin (See 2 Med. 20. and the express words of the statute of distribution), and the wife surviving shares with the children or other next of kin.

*of husband
the last,
claiming
Stat. 8th*

(15) So with us, the crown is entitled if no kin can be found. In such cases, therefore, a suit is commenced in the ecclesiastical court, in the name of the attorney-general, for the administration, &c. If, indeed, the want of kin ariseth not from natural events, but from legal ordinances, as e. g. from the deceased being a bastard, dying without a wife or children, the humanity of the crown usually suffers his next of kin by nature, though not recognized by the law, to get administration as the appointees of the attorney-general, or of the crown, by letters patent. See 3 P. Wms. 33.

There was originally no representation among collaterals. The novels gave it as far as brothers and sisters children, but this was subsequent to the æra of the institutes.

A mother, by the ancient law, did not succeed to the estate of her children (16), nor the children

(16) This rule, which was also that of our law in ancient times, as to personal as well as real estates, has given occasion to one of the most celebrated wits of modern days, to put in the mouth of one of the pleasantest creatures of his brain, this laughable observation:—*I cannot be persuaded*, says he, *but that the Duchess of Suffolk was some relation to her son*. To understand the whole wit of this, the reader must peruse the following ridiculous, but gravely delivered, extracts from Swinburne:

“ It hath not only been a question amongst the best
 “ lawyers in the land, whether the mother be of kin to
 “ her child, but after much disputation it hath also been ad-
 “ judged in the negative, viz. that the mother is not of
 “ kin to her child, in the case of the Duchess of Suffolk,
 “ in the reign of Edward the Sixth. What the reasons
 “ were, whereby the civilians were moved to be of this
 “ opinion, I cannot, says Swinburne, easily conceive, un-
 “ less it were this, that *mater non numeratur inter con-*
 “ *sanguineos*, or unless it were the ancient law of the Twelve
 “ Tables, which excluded the mother from succeeding to
 “ the inheritance of the son or daughter. But the reasons
 “ which moved the temporal lawyers to be of this mind
 “ were, First, because lands cannot ascend, and therefore
 “ they concluded the same of chattels. Secondly, because
 “ the children are of the blood of the parents, yet are not
 “ parents of the blood of their children. Thirdly, because
 “ the father, mother, and child, though three persons, yet

to the estate of the mother. But by the *Sc.tum Orficianum*, passed before the institutes, the children were admitted to the benefit of this natural right; and by the *Sc.tum Tertullianum*, also prior to the institutes, the mother could succeed to the children, but the grandmother could not till the 118 novel.

This law of successions, though from it the statute of distributions has by some been said to be copied, and all admit a similarity in many respects, yet contains some striking differences from that remarkable act of our legislature. In the very first step of the latter, where there are a widow and children, the widow has her legal share; whereas in the Roman law she did not come in until all, even the collaterals, were exhausted. So in the next step, viz. where there are no children, she has a moiety, a thing unknown to the Roman law: if, indeed, neither widow nor children, then the next of kin are to be investigated and looked for according to the rules of the civil law (and so in looking for an administrator), with this difference only, that with them the ascending line took place of all but brothers and sisters; with us, as we have noted, a collateral in nearer degree takes place of an ascendant in one more remote. We must add to these observations the following: that the half

“are but *una caro* one flesh, and consequently no degree of
“kindred betwixt them.”

Quis talia legens—temperet a risu?

blood is not postponed by us, as with them, and that we admit the husband to succeed to the administration of the wife's personal property, in preference to every other relation; whereas Rome postponed him to them all, with regard to every species of her property (17).

(17) Besides the cases referred to in the foregoing chapter, whoever wishes to be better acquainted with the statute of distributions, which has given rise to as much controversy, and as many doubts, as almost any in the statute book, and which Lord Hardwicke observes in *Stanley v. Stanley*, 1 Atk. 455. to have been most incorrectly penned, would do well to consult amongst others *Pett v. Pett*, 1 Salk. 250. which determined that one brother's grandchildren cannot share with another brother's children. *Palmer and Elliot*, 3 Mod. 51. and *Carter and Crawley*, *Raymond*, 496. in which an account is given of the contention between the common law and ecclesiastical courts which gave rise to this statute, and *Edwards v. Freeman*, 2 P. Wms. 441 *. where Sir Joseph Jekyll states at large the occasion of making it, which was in favour of the practice of the spiritual court, which had endeavoured to force administration to distribute, but was constantly prohibited by the temporal court, because it would have been allowing them to compel the execution of a trust. The endeavours of the civil courts were truly laudable, yet Lord North ascribes them to sinister motives. *T. Raym.* 499.

* In this case, and *Wallis v. Hudson*, determined that a posthumous child takes under the statute, according to the civil law, which considers such child as born, as to every thing that respects its advantage. There is no determination that half blood should take equally with the whole, where the case is under the statute of James II

Besides the cases already mentioned, see that of *Bowers v. Littlewood*, 1 P. Wms. 593, which ruled, that between an uncle and a deceased aunt's son, the latter shall have no share.

Witter v. Witter, 3 P. Wms. 102. that an estate per autre vie, is distributable in equity, though not in the spiritual courts.

Durant v. Prestwood, 1 Atkyns, 454. that aunts and nephews are in the same degree of relation to an intestate, and equally entitled under the statute of distributions, and in such case no right of representation.—They must take per capita, not per stirpes.

CHAPTER VII.

OF TITLE BY OCCUPANCY.

THE grand division of titles to things made by Mr. Justice Blackstone, is into those by descent and those by purchase. Justinian divides them into those originating in the law of nature and nations, and those founded on civil, municipal, or positive law.

Under the former he enumerates occupancy, accession, and tradition. Under the latter, prescription, donation, succession by descent, by will, or by grant of the bonorum possessio.

The doctrines of the civil law on the heads of occupancy, accession, or tradition, have been with his usual perspicuity compared with ours by Mr. Justice Blackstone; and what Justinian says upon them in the 1. chap. 2. book of the Institutes, is so plainly delivered, and so clearly arranged, that nothing but a culpable and ridiculous love of novelty will ever induce the instructor to depart from his order.

He divides occupancy into apprehensio, seizing; and inventio, finding.

The prey acquired by hunting, and the plunder by war, formed the two classes of things which might be appropriated by seizure. Of game laws, it has been observed, the Romans had no notion; they knew of no restriction in killing game as to the sportsman or the subject of his pursuit. Every man was at liberty to kill any beast or bird, *feræ nature*, within his own territories, but not upon another man's ground without consent of the owner of the soil. Though a beast was wounded in the chase, no property was acquired in it till taken; and in game taken alive, there was only a qualified property, so that if it escaped it was liable to seizure and appropriation by the first occupant, unless it had *animus revertendi*, or discovered its owner by some mark annexed to it, as a collar, and in these respects our law agrees; fish, if taken in public rivers, became the occupants, but not if taken in public waters or ponds (1).

As to seizure in war, it gave in the opinion of the Romans, provided the war was just (and their ingenuity easily found pretexts for giving it a colour of justice), an uncontrolled power over

(1) Justinian particularly notices bees among creatures wild by nature, with an attention which should seem to shew that honey was a produce of much more consideration in ancient times than now; and Bracton, with a similar attention, observes the coincidence of our law with respect to these animals.

the person of the captive: his immoveable property was transferred to the public or conquering state; his moveables became the spoils which contributed to reward the private warrior (2).

If a man's goods were taken from him by robbers or enemies, and afterwards recaptured or recovered, they became or not the property of this new seizer or occupant, according as there was or was not at the time, a possibility left for the original owner to recover them. See Dig. 41. 1. 44 (3).

(2) The comparatively mild consequences of war in modern times, shew in horrid contrast the barbarity of the Romans. What should we think of dragging a captive admiral, or general, at the wheels of a victor's carriage through the streets, exposed to the insults of the mob, and then strangling them in prison? Yet such was their conduct even to wretched princes, and to beautiful queens, from Perseus to Zenobia. Their unrelenting pursuit of Hannibal and Jugurtha are but spots amongst the thousand black instances of the total absence of every spark of generosity from their merciless policy. Surely nothing but the early prejudice excited by the animated colouring and beautiful compositions of their wonderfully able writers, could make us speak of the moral character of such a nation with enthusiasm and admiration, much and justly as we may praise their laws, their taste, and their genius.

(3) The *Jus Postliminii* would not operate in England, if the property was completely changed, quoad third persons against recaptors, did not the prize acts direct all recaptured British property to be restored on salvage.

Invention, or finding, was either of things that never had been in the possession of any person, as for example, a newly discovered uninhabited island, or of things of which, though once appropriated, the owner could not now be found. In both instances the imperial law, in pursuance of the law of nature, gave the property to the first occupant—the laws of England give it *generally* to the king (4).

Of the latter species, the most remarkable besides waifs and estrays, are treasure trove, and wrecks.

Treasure trove, when the owner could not be discovered, belonged, by the civil law, to the finder, if found on his own, or on unappropriated ground. If upon the land of another, the law made a distinction between the discovery produced by accident and by search, giving in the former case half, in the latter the whole, to the owner of the soil, Dig 41. 1. 31. 1. Code 10. 15. Inst. 2. 1. 39. A tenant for long term of years, was considered as lord of the soil, and he, not the lord or proprietor, was to have the benefit of the

(4) *Generally* is added, because there are exceptions, e. g. though treasure hidden *in* the earth, afterwards discovered (the owner not appearing) belongs to the king, yet treasure trove, if found *on* the earth, or *in the sea*, would belong to the finder. Dr. Christian, indeed, insists that the general rules of our law respecting *bona vacantia*, agree with the civil, and that the king's rights are the exception.

discovery. The same rules extended to newly discovered mines (5).

Wreck.—The Rhodian laws having, in case of wreck, made the ship and goods seizable by the lord of the place, though all the persons were saved and alive; therefore the Romans were more particular and express in forbidding any man to meddle with such goods as were wrecked, in making the plunderer to return fourfold, and in declaring that they remained the property of the original owner, without escheating to any body (6), unless for want of claim within a year and a day; in which case, by that law also, they escheated to the exchequer.

(5) With us, if a man grants his lands, all profits within the bowels of the land pass, as mines of tin, lead, iron, coal, &c. Co. L. 4. a. If he let his land, open mines on it pass, 2 Lev. 185. We have numerous statutes in Ireland made to enable landlords, where mines are reserved, to enter upon demised lands, in order to open and work mines under certain restrictions, and for various other purposes. Mines of gold and silver belong to the king, and a subject cannot have such royal mines but by grant from him, and that in express words, for a general grant of mines would not pass them. Plowden, 336.

(6) See Lib. 14. Dig. de acq. rer. dom. and see lib. 47. Dig. tit. 9. de incendio, ruina & naufragio. Read also the *Lex Rhodia de Jactu* in the 14th book of the *Pandects*, and compare it with Molloy's chapter on Average and Contribution. And see the 2d volume of this work. See also the 3d chapter of the 2d volume of this work, on *Droits of Admiralty*.

By *derelicts*, were meant in the Roman law, things voluntarily abandoned with intention to leave them for ever (7). Things therefore thrown away from necessity, as to lighten a ship in a storm, or things lost by negligence or chance, were not derelicts. 2 Inst. tit. 1.

The term derelict is applied in our law, but in a very different sense, to lands gained by the dereliction of the sea, which belonged to the king.

If no owner was found for lands, the civil law termed them *hæreditas jacens*, and gave them to the first occupant. With us, in such case, they go to the king, except in the case of an estate *per auter vie*.

After occupancy, the civil law considers accession, which was natural, artificial, or mixt.

Natural accessions were, First, By procreation; thus title arose to the offspring of slaves, and the young of brute animals. Secondly, by alluvion, or secret insensible addition of earth, washed up

(7) Derelicts, says Harris, are by us called waifs and estrays; surely not, as appears from the description which stared the learned commentator in the face in that text, to which he has affixed the note.

On the contrary, Wood says we have no derelicts; for though a man so abandon his property, he may change his mind and reclaim it again; perhaps so, but after a certain length of time, after a year and a day, his claim would come too late: however, such voluntary abandonment of property is too imaginary to require much discussion.

by the sea or a river (8). If indeed the impetuosity of a river tore away a portion of ground, and joined it to a neighbour's estate, it did not become his until it had indissolubly coalesced. Thirdly, By the rising of an island in a public river or the sea, a case which, however uncommon except in volcanic countries, our law has in its accuracy not forgotten (9). Fourthly, A river forsaking its natural channel, which is then divided between the owners of the adjacent lands.

Artificial accessions were,

1st. Specification.—The original owner of any thing improved by the act of another, retained his ownership in the thing so improved, unless it was changed into a different species; as if his grapes were made into wine, the wine belonged to the maker, who was only obliged to pay the owner for the value of his grapes.

The species, however, must be incapable of being restored to its ancient form; not such, for

(8) If lands are gained by the alluvion or dereliction of the sea, or of a river, our law, if the increase be gradual and imperceptible, gives them to the owner of the land adjoining, if rapid, to the king. I have observed, in an introductory chapter, that such events in torrid regions, where Ganges rolls his rapid stream, are much more frequent than in these countries, where the subject may appear rather immaterial.

(9) Giving the property to the king, and not to the occupant, as the civil law did.

instance, as a wrought vessel that could be melted down; and the materials must have been taken in ignorance of their being the property of another (10).

2d. Adjunction.—When something is added to a subject more than is in it, or than it had before, as embroidery to a garment, building on another man's ground, writing on another's parchment. The general rule here was, that the accessory follows its principal, and that the whole belongs to the owner of that principal, though the accessory be of greater value; thus the purple superadded to a coarse garment, would be carried with it to the owner of that garment, but though the property of the thing added was lost, as long as adjunction continued, yet an action lay to have the thing added, separated, and restored; or if that could not be done, to be compensated in damages. If the adjunction was made by mistake, and by the owner of the accessory, he might keep possession until paid the value of the thing added (11).

These principles, as they give trees planted, corn sown, and buildings erected, in and upon the land

(10) Mr. Justice Blackstone omits these two requisites in his delineation of the civil law upon this subject.

(11) Our law agrees. See Dr. Christian's note to page 404. 2 Bl. Com.

of another, to the owner of the land, so do they give to the owner of paper or parchment, the writing thereon ; meaning surely, says Sir William Blackstone, only the mechanical operation of writing ; for, says the learned judge, the same law, where a painting has been done on another man's canvas, gives the canvas to the painter. I am very willing to admit the argument, that this respect to works of genius and invention in one case, implies it in the other ; and very unwilling to admit an interpretation fraught with such absurdities as the contradictory of this opinion ; yet Ayliffe and Wood have understood the following paragraph in its literal sense : *Si in chartis membranisque tuis carmen vel historiam vel orationem Titius scripserit, hujus corporis non Titius sed tu dominus esse videris* (12) ; and Justinian allows, that previously to his time, there had been a great dispute, whether the most valuable picture should not cede to the ownership of the canvas.

It must be noted, that in the instances of building, planting, or sowing, though the owner of the ground became master of the house, the tree, or the crop, yet he must pay for the materials, the workmanship, the seed, and the labour, if they were expended through mistake and in error

(12) Inst. 2. 1. 33. Titius answers to the J. S. of our law writers. The Romans have been perfectly silent on the subject of literary property.

of the true title, as common justice evidently required.

Confusion.—Which meant a mixture of liquids. This, if made by consent, became a mixed property, and so if by accident, unless there could be a separation without any prejudice. Commixture meant a mixture of solids, which could not be in common unless by general consent; if by accident, the heap was to be divided as nearly as the proportion of each man's property, or of the value thereof, could be ascertained. If the intermixture was occasioned by the wilful act of one man, without the knowledge or approbation of another, the sole property was given to him who had not interfered in the mixture, satisfaction however being allowed to the other for what he had lost (13).

Mixt Accession.—The most remarkable title acquired in this mode, was to the profits of an estate possessed by a man bona fide, on an erroneous supposition of a title to the land, which in reality was not valid (14).

(13) Our law allows no such satisfaction to such fraudulent or officious or mischievous intermixture; in other respects it pretty much agrees with the civil on this subject. See B. L. Com. 405.

(14) Every body knows the difference of our law upon this subject, and that the possessor, however innocent, must account for the profits, and indeed the Roman law meant

To accession, the civilians refer the law of fixtures, here observing the usual principles of accession, by permitting the possessor to take away what has been erected or made by him, if it can be done without prejudice to the rights of the proprietor, or at least giving the former a right to demand retribution to the amount of their value (15).

To these original methods of acquiring property by the law of nature and nations, viz. occupancy and accession, the civilians add a third from the same sources, which they term derivative, viz. *tradition* or *delivery*. But as delivery seems to be more properly referred to modes of conveying, than to origination of property, since the title is by the grant, of which the delivery is evidence, and to which it ought to be a concomitant, I shall beg leave to consider it under the head of title by alienation, though I do not

only that he should not pay for the produce of the ground actually consumed, and not that he should not account for rents received, &c. &c.

(15) See Dig. 25. Lib. and Wood, p. 96, octavo: the English lawyer knows how much our rules, with respect to fixtures, (which formerly were considered as immovable, having become part of the house or building, 1 Inst. 53. a.) have been relaxed of late years; a tenant, for instance, having been permitted to carry away not only things relative to trade, as mills, brewing vessels, &c. &c. but even marble chimney-pieces, &c. &c.

deny that delivery by the Roman law was very often essential to the completion of the title, but it was not universally (16).

(16) For instance, it was disputed whether legal delivery in its commencement, was a requisite to title by prescription, Ayliffe, 324 ; for the rules respecting delivery, and things to be considered therein, see Wood, p. 101. Ayliffe, 297. the property of things sold was not transferred without delivery.

CHAPTER VIII.

OF TITLE BY PRESCRIPTION, ESCHEAT, FORFEITURE, AND ALIENATION.

PRESCRIPTION (1), or the acquisition of property by continuance of possession, is evidently a creature of municipal law, since no length of time could, by the law of nature, alter or divest a right once acquired. It originated, says Wood, with the Greeks; the divine law forbade it, as well as perpetual alienations.

Under the name of prescriptions, the Romans, however, included not merely title to property, whether moveable or immoveable, corporeal or incorporeal, from length of possession; but also limitation of suits, and even of personal ac-

(1) The title of prescription, says Blackstone, was well known in the Roman law by the name of *Usucapio*, vol. 2. ch. 17. The Roman law, however, distinguished between *usucapion* and *prescription*; applying the former to things moveable, the latter to immoveables; and surely there is a great dissimilitude between the Roman prescription and ours, as that of the civil law was applicable to lands, and not from time immemorial.

tions (2), which were barred or prescribed against by length of time. The time which gave a right to prescription, was three years for things moveable, ten years for things immoveable or incorporeal, if the person claiming right against the possessor was present, *i. e.* resided in the same province (3), twenty if he was absent; *i. e.* inhabited a different one.

Prescription therefore with them was not immemorial usage, but a certain length of possession.

To make a valid prescription, four things were requisite, besides the period of time ordained by law.

First, That the possession should have been originally obtained honestly and bona fide, as far as regarded the mind and intentions of the purchaser, though he might have been mistaken in his title, or that of the vendor. And the canon law did away the prescription, if at any time the purchaser became really connusant of his origi-

(2) Our law undoubtedly declares, that no prescription can give a title to lands, but as length of possession can give a title to lands, by ousting the possibility of bringing any suit to recover them, it seems to be a declaration of little import, and indeed rather an odd provision, since the same law in fact says, no man shall claim a title to lands by immemorial usage of holding them, and yet sixty years possession of lands in fee simple, uninterruptedly, shall be a title against all the world.

(3) The civilians allow ten years also to make a custom. Hence the temporal courts will not suffer the ecclesiastical to try a custom, and will issue a prohibition, if they attempt it.

nal error, and the consequent imperfection of title.

Secondly, That the possession was acquired for a lawful consideration, as by donation, purchase, or succession, *i. e.* for such a cause as would entitle the receiver to the property, supposing the person from whom he received it to be the true owner; a tenant therefore could not prescribe against his landlord, nor the possessor of a thing lent or deposited against its true and rightful proprietor.

Thirdly, Uninterrupted possession. Interruption of possession was called usurpation (4), and was either natural or civil. The former consisting in entering into and upon immoveable things, the latter in taking away those moveable. Civil interruption was the interposition of a legal claim in a court of justice.

Fourthly. The thing must be capable of prescription. Things sacred and consecrated to God were not liable to prescription, and the same exception held as to the domains of the prince (5). The property of minors, of soldiers upon expeditions, and of persons absent on the business of the commonwealth, enjoyed the same privilege; and the subjects prohibited to be alienated by

(4) A term frequently introduced into the ecclesiastical law.

(5) Thus in our law, *Nullum tempus occurrit ecclesiæ, Nullum tempus occurrit regi.*

will, were incapable of being vindicated by pretence of possession.

I have said, that under this head, the civil law considered limitation of actions. Real actions, by which the civil law meant all actions for the recovery of property (6), brought by a man demanding something that was his own, and founded on dominion, or *jus in re*, were of course limited as to the time of bringing them, by the respective periods which formed valid prescriptions in the respective cases mentioned above.

Personal actions, or those in which a man claimed a debt or duty, and which were founded on obligation, or *jus ad rem*, and mixed actions in which some specific thing was demanded, and some personal obligation also claimed to be performed, must regularly have been brought within thirty years, Code 7. 35. 5. to this however some exceptions are found in the same book of the Code, in its 39th Title: and the 9th of the Novels, allows the church to bring such actions at any time within the period of one hundred years from cause accrued.

The civil law also established a limit to the bringing or prosecuting of criminal proceedings,

(6) The meaning was not restrained to the recovery of what we call real property, the Romans knowing no such distinction: As we have often observed, their grand distinction was into moveables and immoveables.

the right of accusing being ordinarily limited to twenty years, and the ordinances of Scotland have followed this example (7).

ESCHEAT.—This title, in our strict legal sense of it, was unknown to the Romans, and in a more extended one takes up such little space in the civil code, that it is scarcely visible, which is not surprising, since, as Sir William Blackstone observes, escheat, strictly speaking, was one of the fruits and consequences of feudal tenure: as far, however, as it denotes an obstruction of the course of descent, which must frequently happen in all countries, and is therefore a case requiring provision in all laws, it must not be entirely omitted; nor is it disregarded by the imperial law, sufficiently attentive to the rights of the crown, however unacquainted with the claims of the feudal lord.

I shall, therefore, in imitation of the learned commentator on the laws of England, consider the several cases in which hereditary blood might be deficient according to the civil law, and a right to property thereby become vested in the exchequer (8), not like the modern escheat, in con-

(7) Quere, whether such limitation be not founded in reason?

(8) It may be remarked here, once for all, that *fiscus* originally signified the proper money of the prince; *aerarium* the public treasure. But the latter meaning in subsequent times was annexed to *fiscus* also, and the privy purse was denominated *patrimoniale*.

sequence of any feignory or lordship paramount, but as the fruit of prerogative existing in the prince. The want of heirs I have already mentioned in the chapter of Descents, as occasioning a devolution of property to the throne: to this deficiency, according to the course of nature, we must add unnatural births,—monsters being excluded from succession by their law as well as our own; the civil, however, accounted them children, as far as related to any privilege of the parent, such as the *jus trium liberorum*, whereas ours will not permit such an offspring to entitle the father to be tenant by the curtesy (9). I have also noticed, in the chapter on Marriage, the legitimization of bastards produced by subsequent wedlock; and have elsewhere marked the admission of the concubine and her son to one half of the inheritance, where no lawful wife or child, and the succession of the bastard to the mother's inheritance, although she was never married, though not to the father's (10). With these exceptions, bastards at Rome were, as well as bastards in Britain, incapable of inheriting. But the offspring of incestuous marriage, or of adultery, could not inherit even to the mother (11). Aliens also were incapable of being devisees, as well as of being heirs; since the general principle of the civil law was, at least till the time of Antoninus,

(9) See F. f. 1. 5. 14. Co. L. 29.

(10) See note to p. 126.

(11) Nev. 29. ch. 15.

that foreigners had no right to the laws or privileges of any particular place where they sojourned (12), and the cruel incapacities of succeeding to them, or the *droits d'aubaine*, formerly known to France and Holland, are said, by Domat, to have originated in the civil law (13).

The doctrine of escheat by corruption of blood, would in vain be looked for in the imperial law. It came into England with the conquest, and was unknown even to the Saxon tenures.

FORFEITURE.—But though escheat, in consequence of crimes, is a creature of modern times, yet forfeiture of property for offences was familiar to the Romans, and indeed incident to all capital offences, until Justinian moderated the severity of the law in certain particulars (14). Of the

(12) See Ayliffe, book. 2. lib. 3. and l. 1. *Code de hæc. ins.*

(13) See Ayliffe, book 3. lib. 25. *vacantia mortuorum bona tunc ad fiscum jubemus transferri, si nullum ex qualibet sanguinis linea vel juris titulo legitimum reliquerit intestatus hæredem.* But the treasury was barred by non claim during four years, and in several excepted cases did not come in at all; the church being preferred if the deceased had been a clergyman, and any corporation if he had been a member thereof.

(14) The alterations by him made will come properly under the head of Public Wrongs. It is worthy of the civilians observation, that with us the goods of traitors and felons, &c. &c. found within the admiralty jurisdiction, are *droits* or perquisites of the admiralty; so are wrecks, jet-

other causes of forfeiture enumerated by the English law, the most remarkable are lapse, simony, and bankruptcy.

The right of lapse having been established about the time of the council of Lateran, as late as the reign of our Henry the Second, of course is unnoticed by the Imperialists, and the law of simony must be traced through the provisions of a different jurisprudence, that of the canonists (15).

Bankruptcy.—This title is noticed in the 3d book, 26th title of the Institutes, under the name

san, flossan, ligan, derelicts, and deodans, not granted to the lords of manors, or others; and so are all the goods of the king's enemies taken without commission, or found, or by accident brought within the admiralty commissions. See Comyn's Admiralty, D. and the cases there referred to. There have been of late some important questions respecting the droits of admiralty in Ireland; which are not yet decided.

(15) The common law of England has not considered simony in the light of a spiritual crime (under which consideration it has left it to ecclesiastical censures) but merely as the source and cause of invalidating agreements tainted by it. The statute law, however, of that country, has by provisions, *not yet introduced into Ireland*, imposed pecuniary penalties on the parties concerned in such corrupt agreements; the ecclesiastical courts in punishing it, are guided by the canon law as far as received in these countries, but the limits of this reception do not seem to be accurately ascertained; for instance, whether they extend to *resignations*, has been lately made a question in Ireland.

of *Cessio Bonorum*. Bankruptcy, through vice or folly, was declared infamous and generated infamy at Rome; and fraudulent alienations to prevent its effects, and attempts of debtors to defeat their creditors, were guarded against by provisions which may be found in the forty-second book of the *Pandects*, 8. 10.

All persons who became insolvent, and fraudulently concealed or absented themselves, became bankrupts at Rome, whether traders or not; they were called *decoctores*, and the method of proceeding against them is pointed out in the forty-eighth book of the *Pandects*, 17. 5. If they became bankrupts through their own vice or folly, they were expelled from the college of merchants, and not suffered to trade again. Bankrupts from riotous living were put to hard labour for their creditors, and knavish bankrupts concealing their effects were punished with death. If bankrupts became so by real misfortune, on delivery of their effects, the debts to answer which they were not adequate, were postponed; but the fruits of their future industry remained always liable (16).

(16) Not the whole fruits, but as much as they were able to pay; see 4th book of the *Institutes*, 6. 40. What merit should be allowed to the framers of our bankrupt laws, will be evident on perusal of the text above, and how little their invention was put to the rack, having the Roman law before their eyes, from which they borrowed almost every idea. See Ayliffe, 347.

Alienation.—I shall here consider who might alien, and to whom ; what things were unalienable, and how a man might alien.

All persons might alien their property who were not under some special disability created by the law ; these disabilities therefore are the chief matter for our consideration. The eighth division in the second book of the Institutes bears this title, *Quibus Alienare Licet vel non Licet*. It begins with the husband, who could not alienate lands which came to him in right of his wife as a marriage portion ; and then proceeds to mention the mortgagee, who, though not owner of the pledge, may sell it, and the minor, who, though master of his fortune, cannot alienate any part of it without the consent of his guardian. This, however, is a very imperfect enumeration of the persons forbidden to alien by the civil law, for we must add idiots, lunatics, prodigals, persons banished during their life, heretics, and traitors (17). Aliens appear to have been under almost every disability known among us, until Antoninus communicated the *jus civitatis*, to all the inhabitants of the empire.

Things sacred and religious, and in general all

(17) See Pandects 36. 5. 15. that condemned persons, after sentence, could not aliene. Idiots, infants, persons attainted of treason or felony, are prohibited to aliene by our law.

things *not in commerce*, and the goods and property of the church, and the crown lands, could not be alienated (18); and the civil law was particularly careful to prevent what we call champerty, by forbidding things litigious to be alienated, (meaning by things litigious, those about whose property there was any dispute) during the time of the contest.

As to the modes of transferring property, the student must not expect to find precedents of conveyances as he would in the common lawyer's library, nor has the imperial law gone into a detailed account of different species of deeds in the manner pursued by Mr. Justice Blackstone; but it is said in general, that things must be transferred by delivery, and distinguished delivery into true and feigned.

True delivery was handing over the thing if moveable, and giving possession of it if immovable. Possession of part might be given in the name of the whole, and by proxy, as well as by the owner himself (19). Feigned delivery was when the intention of the testator being suffi-

(18) If it came to the church from a private donor, it might be alienated from necessity to pay the debts of the church. See Nov. 7. *de non alienandis rebus ecclesiasticis*: as to crown lands. See Code 11. b. 2. The meaning of things *not in commerce* has been explained before.

(19) See Inst. 2. 1. Dig. 41. 2. 3.

ently expressed, a solemn delivery was supposed, though not actually made, which fiction was peculiarly necessary in passing incorporeal estates. Thus a feigned delivery might be made by delivering a deed containing the description of the thing intended to be conveyed (20). Thus delivery of the keys gave a possessory right to a house, and even verbal delivery of the possession of lands at a distance, if within view, was a good delivery of them (21).

The private written instruments, chiefly noticed by the civil law, are *cautio*, a note or bill for money received; *apocha*, the creditor's receipt or acquittance on the debt being paid; *antapocha*, a tenant's acknowledgment that he had paid rent to a landlord, seemingly intended for the same purposes with our attornment; *literæ*—letters commendatory, testimonial, or credential; *chirographa*, which may be compared with deeds poll;

(20) This effect of deeds in the Roman law is particularly recognized in Code 8. 54. 1. where they are called *instrumenta*.

(21) Dig. 41. 2. 18. 2. it was called the *fictio brevis manus*, if goods being already in a man's possession as a pledge or loan, were afterwards given or sold to him; if the thing was shewn at a distance, it was delivery *longa manu*. If some token was delivered, as a key or a deed, it was called symbolical. But upon symbolical deliveries see the dicta of Lord C. in Ward and Turner, 2d Vesey.

and *syngrapha*, which answered to deeds indented (22).

(22) *Syngrapha* are mentioned by Cicero and Plautus ; in the latter, though poetical authority may not be very good in such cases, is one of the few precedents of them handed down to us. *Chirographa* are spoken of by Juvenal. As to *facta* for deeds, and *dimissio terrarum* for a lease, they are phrases of modern corrupted latinity.

CHAPTER IX.

OF TITLE BY GIFT, INTER VIVOS, MORTIS CAUSA,
AND PROPTER NUPTIAS.

GIFTS were by the Romans distinguished into proper and improper. The proper gift, or *donatio inter vivos*, was when one out of mere liberality, and urged by no other motive, bestowed any thing upon another. The improper, when his liberality was urged by the prospect of death, or elicited by reason of marriage.

The student will be surprized to find the civil law elaborate and prolix on the subject of gifts *inter vivos*, which by ours are little noticed, or confounded with grants; but I should think his time mispent in examining this head further than to note the following particulars (1).

Gifts were revocable for three causes only (2).

First. Where the gift was inofficious, viz. depriving the next of kin of their equitable share.

(1) He may compare these gifts, however, with our voluntary settlements, or gratuitous bonds.

(2) With us, a gift absolutely made, without providing a power of revocation, cannot be recalled; but see the case of *Naldred v. Gilham*, 1 P. Wms. 577.

Secondly. For ingratitude to the giver, the degree of which however was not left to be determined by fancy, but ascertained by law, and limited to five instances, viz. defamation of the character, or assault of the person of the giver, snares against his life, injury to his property, or refusal to fulfil agreements entered into at the time of the gift. See Code 8. 5 b. 10.

Thirdly. If the giver afterwards happened to have children (3).

If the gift exceeded the value of five hundred crowns, it must have been publicly registered at the time of the gift made (4), with certain exceptions mentioned in the eighth book of the Code, among which were gifts made by the Emperor, or to him, but latterly the conduits of his liberality were confined to public instruments, subscribed with the royal signature and attested by witnesses. Persons doating, madmen, prodigals, and minors, were not capable of making gifts; nor persons born deaf and dumb, nor married persons to each other, as we have noticed before in the chapter on marriage; a son, under the father's power, was not capable of receiving a gift to his own

(3) Compare with this provision the various cases in our report books, respecting revocation of wills by marriage, or the birth of a child.

(4) Code 8. 54. 27. here is one instance of a public registry of deeds at Rome; in France the law was the same. Groenweg.

use, for he could only take for the father's benefit: things sacred or public could not be made the subject of a gift, nor could, as it should seem, contingent rights. See 8 lib. Code 24, 39, and 42, of the Pandects.

DONATIO MORTIS CAUSA. The seventh title of the second book of the Institutes, and the sixth chapter of the thirty-ninth book of the Pandects, have for their subjects *donationes mortis causa*, and are to be particularly recommended to the student's perusal. The definition given in the latter is this: *mortis causa donatio est, cum quis magis habere se vult, quam cum cui donat, magisque cum qui donat, quam heredem suum* (5). It then enumerates three species of these donations, one induced by no apprehension of present danger, but merely by the general consideration of mortality; another when a person apprehending imminent danger so gives, *ut statim fiat accipientis*; the third, when any one induced by danger does not give so that the property should pass at the time, but only when death shall have followed, *tunc demum cum mors fuerit secuta*; and it observes, that these inducements may be not only ill health, but impending danger from an enemy, from robbers, or from the hand of power, or a projected journey, or voyage, or even

(5) It gives as an instance the gift made by Telemachus to Pircæus, in Homer. *Odyssey*, book 17.

weariness of life, occasioned by extreme old age (6).

The Institutes, without making this triple division of such donations, preface the same general

(6) In Ward and Turner, 2 Vesey, 431. Lord Chancellor Hardwicke takes notice of the three kinds of donationes mortis causa, and thus describes them: The first is a donation by one in no present danger, but in consideration of mortality if he died, and this is strictly compared to a legacy, for the property was to pass at the death, not at the time; the second kind is, where the property passed at the time defeasible, in case of an escape from that danger in view, or of a recovery from that illness; the third was where, though he was moved with that danger, yet not thinking it so immediate as to vest the property immediately in the person, he put it in possession of that person as an inchoate gift to take effect in case he should die.

In Tate and Hilbert, 1793, 2 Vesey, jun. 111. the Lord Chancellor seems to understand the two first species in a different sense, and says, they were evidently mere donations, and according to a note which I took in Bilby and Coulter, in the exchequer in Ireland, 1791, that court seemed also to consider the two former as in fact and effect, donations inter vivos. The truth is, the Roman lawyers seem to have fallen into a confusion of expression, by considering gifts to take effect presently and irrevocably, as donationes mortis causa, if they were made while under apprehension of danger of death. To correct this the Dig. lib. 39. c. 27. says, *ubi ita donatur mortis causa, ut nullo casu revocetur, mors causa donandi magis est quam mortis casu donatio: et ideo perinde haberi debet, ac alia quævis inter vivos donatio. Ideoque inter viros & uxores non valet.* And Swinburne, page 23, says, the last kind of gift, and not the first, is that which is compared to a legacy, but the

definition by another more particular; *mortis causa donatio est, quæ propter mortis fit suspicionem cum quis ita donat, ut si quod humanitus sibi contigisset haberet is qui accipit; si autem supervixisset is qui donavit reciperet, vel si eum donationis pœnituisset, aut prior decefferit is, cui donatum sit.*

The Institutes, therefore, which were published after the Pandects, seem to be thus particular to prevent the confounding absolute irrevocable gifts, though made under apprehension of death, with donationes mortis causa, properly so called. Whether delivery was necessary to make these gifts mortis causa good and valid, was a question on which the civilians seemed not to have agreed, but Lord Hardwicke has reconciled their different opinions (7), by shewing, that an absolute delivery of possession was not requisite to the first or third kind of gift before mentioned, but that in the second case, where the property was to pass immediately, it was required (8).

other two are reputed simple gifts, if the giver do not make express mention of his death, and so they cannot be revoked. And it appears from Heineccius Antiq. lib. 2. tit. 7. sec. 19. that some gifts that were irrevocable were at Rome improperly ranked among donationes mortis causa.

(7) In the aforesaid case of *Ward v. Turner*, 2 Vesey, 431, in which case, says Mr. Cox, in those excellent notes on *P. Wms.* which have done him so much honour, all the law upon the subject of donations mortis causa is collected.

(8) But by the civil law, as received or allowed in England, and consequently by the law of England, says Lord

All persons were capable of receiving donations *mortis causa*, that were capable of receiving legacies; and he who might make a testament, might also make a donation *mortis causa*; and a *filius familias*, who could not make a testament, even with the consent of his father, could make a *donatio mortis causa*, his father permitting.

It was necessary to mention at the time, that the gift was made in contemplation of danger or of death: it must also have been made in the presence of five witnesses (9); but it was not essential that it should have been made in the donor's last illness (10). The presence of the donee seems to have been necessary, from Dig. 39. 6. 38. (11).

Chancellor in the same case, delivery is necessary to make good a donation *mortis causa*; and since delivery is necessary, of course the thing must be capable of delivery, and questions which have naturally arisen in our law are, whether there has been a sufficient delivery or not.

(9) This is not requisite with us.

(10) This appears to be essential with us, and is expressly said to be so in *Blount and Burrow*, 546. 1 Vesey, Jun. and in *Millar and Millar*. 3 P. Wms. 356.

(11) It is there said, *mortis causa donatur quod præsens præsenti dat*; and the master of the rolls, in *Lawson and Lawson*, and 1 P. Wms. doubts whether that be not the case with us. But it does not seem to be necessary, by the determination in the case of *Drury and Smith*, 1 P. Wms. and by what was said in the court of exchequer in Ireland, in *Bibby and Coulter* in 1791, according to a note I took at the time, of which case a much respected friend, Mr.

In the donation *mortis causa*, strictly so called, the husband could give to the wife (19); I have not found any mention in the civil law of the impossibility of annexing any condition to the gift (13), nor any discussion of the distinctions

Ridgeway, has given a report in a note to his edition of Reports of Cases, in the time of Lord Hardwicke.

Heineccius *Antiq. lib. 2. tit. 7.* observes, that some absolute irrevocable gifts had been classed under *donationes mortis causa*.

(12) So he can with us, *Lawson and Lawson*, 1 P. Wms. 441.

(13) No condition can be annexed to it according to our law, otherwise a testamentary disposition might be grafted upon it, and the statute of frauds evaded; in the case of *Lawson and Lawson*, the master of the rolls declares, that no such gift, though in nature of a legacy, need be proved in testamentary form, it operating as a declaration of trust upon the executor. On the impossibility of annexing any condition to a *donatio mortis causa*, rested the determination of the court of exchequer in Ireland, in 1791, in the case of *Bilby and Coulter*, in which the superior knowledge of the imperial law, possessed by the great and able judge who presides on that bench, was so eminently conspicuous.

For what things are so capable of delivery with us, and for other questions respecting donations *mortis causa*, see *Ward and Turner*, 2 Vesey 431. *Lawson and Lawson*, 1 P. Wms. 441. *Drury and Smith*, 1 P. Wms. 404. *Millar and Millar*, 3 P. Wms. 356. *Snellgrave v. Baily*, 3 Atkyns, 314. S. C. *Ridgeway's cases* in Lord Hardwicke's time, and *Bilby v. Coulter*, in his note thereon. *Jones and Selby*, Prec. in Chan. 300. *Tate and Hilbert*, 2 Vesey, jun. 111. a bond, bill, or note, payable to bearer, is a

between things capable or incapable of delivery in this mode of giving.

Though after a long contest among the Roman lawyers, whether these donations partook most of the nature of gifts or legacies, it was settled in the Institutes, 2 lib. 6. 7. that they should be *ad exemplum legatorum redactæ per omnia*; yet, says Ayliffe, they differed from legacies in the following respects.

First, as we have said, a *filius familias*, though he could not bequeath a legacy, could make a *donatio mortis causa*.

Secondly, These donations were sometimes delivered by the person in his life time, sometimes by his heir, but the legacy always by the heir.

Thirdly, The donee was obliged to render an account of his possession, not so the legatee. Ayliffe, p. 332.

DONATIO PROPTER NUPTIAS. The *donatio propter nuptias*, was a security given to the wife for the return of the fortune she brought

good subject of a *donatio mortis causa*. But not other promissory note or bill of exchange. Delivery of receipts for South Sea annuities not sufficient, Ward and Turner. There can be no such donations of simple contract debts, or arrears of rent, because there can be no delivery, said by L. C. in same case.

In *Tate v. Hilbert*, Lord Chancellor is made to doubt, whether want of delivery might not in some cases be supplied by deed or writing, though it could not by parol.

with the husband, or of an equivalent to it, in case she survived him, or if they should be separated during life. It has been compared to a jointure, to which it bears some resemblance, as being given in consideration of the fortune brought with her; her fortune either proceeded from herself, her mother, or some other person, and was called *dos adventitia*; or from the father, or some of the paternal line, in which case it was called *profecititia*: no part of it by law survived to the husband, not even though there were children by the marriage, though custom seems sometimes to have superceded law in this respect (14). I speak of the course of law where no special settlement or agreement had taken place. The husband's power over her property much resembled that which our law gives him as to a wife's real estate where no settlement. The husband received the profits, but could not alienate it if immoveable (15). If it consisted of moveables,

(14) At one period, if the husband survived, the *dos profecititia* reverted to the father, the *dos adventitia* remained with the husband.

(15) Her lands he could not alienate, not her lands in the provinces, for no claim of usucapion could be set up there, and an express law forbade that title to be set up against her in Italy, against the fundus dotalis *Italicus*. With her consent her lands in the provinces might have been alienated, until Justinian having extended the right of usucapion to the *prædia provincialia*, the legal prohibition of alienation was at the same time extended to provincial estates.

the interests of commerce, and the necessity of disposing of perishable goods, permitted his alienation of it, excepting her *paraphernalia*, but he must make good the value to her, and to prevent any injury from such disposition, that part of his estate included in the *donatio propter nuptias*, which we may call his settled estate (and which was always of the same condition and quantity with her portion) could not be alienated or mortgaged by him, even with her consent, unless in some specified cases of extreme necessity, or unless another estate of equal value was to be settled in lieu of it ; and as a further protection to her, besides this specific security, she had a general lien on all his property to the amount of her portion, and was preferred to all other incumbrances, even though of prior date (16) ; and if he became impaired in fortune, the wife might, even during her marriage, seize her portion or security, or bring an action for it (17).

But though the *donatio propter nuptias* was her security, yet she was not put in possession of it. The husband, during marriage, received the rents, interest, or other profits, both of the estate by him settled, and also of her dos or portion, because he was to be at the necessary charges of the

(16) See Code 5. 13. 30.

(17) Compare this with the act of parliament, 5 Geo. II. ch. 4. Ireland.

marriage state; he was to maintain her though she brought no portion (18).

We have observed, that though the property of the dos was not transferred to the wife, yet the profits of it, as well as of the *donatio propter nuptias*, were received by the husband during marriage. But all her property need not be contained in the dos, part of it might be kept back, which was then called her *paraphernalia* (19); her goods therefore were *dotalitia*, of which the husband had the use and administration, and *paraphernalia*, from *para* and *pherne* over and above her dowry. The *paraphernalia* included property of different kinds, and were not, as with us, confined to wearing apparel, jewels, and other ornaments, and these paraphernalia she might use and alien at pleasure, without the husband's consent, and bring actions in her own name, or in the name of her husband, for the recovery of them (20).

(18) Of course he was liable to her debts for necessities. The dos might be given before or after marriage. The father might be forced by the magistrate to give a portion with his daughter according to his estate and ability. See *Pandects*, 23. 2. 19.

(19) Even all she acquired was his, *quodcumque acquirebat*. See *Heineccius Rom. Antiq. lib. 1. tit. 10. sec. 1.*

(20) Our law differs considerably both in the meaning of paraphernalia, as appears above, and also in the extent of the wife's power over them. They are with us considered as the husband's goods, used by the wife, and to which she becomes entitled at his death, over and above her jointure

or dower ; the husband, though he cannot devise them, may sell or give them away during his life ; and though after his death they are liable to his debts, if his personal estate is exhausted, yet the widow may recover the value from the heir. See 1 P. Wms. 730. 2 Atks. 642. 3 Atks. 394. 2 Atks. 77 & 104. 1 Atks. 440. 1 P. Wms. 729. 2 P. Wms. 79. 544.

Where a husband's personal estate is not sufficient to pay his debts, the wife cannot set up any claim to jewels, rings, pictures, dressing plate, and other trinkets given her before marriage. *Ridout v. Lord Plymouth*, 2 Atks. 104.

CHAPTER X.

OF TITLE BY LAST WILL OR TESTAMENT.

THE property left by any person at his death, must either revert to the common stock, or some individual must be pointed out, who has or shall have a right to succeed to it. This right of succession is of two kinds: the first is called legal succession, when the property descends in the family according to the order of proximity (1). The second, testamentary succession, when that exact order doth not prevail, but the estate of the deceased is transmitted, according to his will and pleasure, within certain restraints however, and limitations fet by the law.

(1) As the origin of property, according to Blackstone, is occupancy, it must terminate with the life of the occupant, unless continued in civil society by the legislature. If the legislature did not interfere, the nearest of kind, as being about his person, would naturally become the next occupants.

The legal ordinary succession is the rule, the testamentary the exception (2); and this exception is seldom admitted in the first stages of government, and the first periods of society. It requires some time and reflection to accustom a people to such a power as that of disinheriting, either totally or partially, the heir of blood—the natural heir.

A testament is thus defined by the Roman law: *Voluntatis nostræ juxta sententia de eo, quod quis post mortem fieri velit.* It was of two kinds—a testament strictly so called, and a codicil: the essential difference between which was, that the former appointed a *hæres*, commonly called the *hæres factus* (who comprehended our two characters of devisee and executor), the latter did not (3).

(2) Therefore descents should be considered before wills, as I have done in imitation of Blackstone and the English law, and in conformity with the opinion of Mr. Gibbon, though in deviation from the civil, and from the order of Justinian's Institutes. The reason given for the contrary order by the civil law, and approved by Heineccius, is, *Quam diu successor a testamento speretur, ab intestato hæredibus locus non datur*; a reason more whimsical than satisfactory.

(3) We use codicil in a different sense, as an appendage to a last will or testament, and do not attend to the distinction above: testament (where it is a distinguishing name) meaning with us a will of personal estate.

Testaments were either solemn or unsolemn (4) : the latter were also called privileged testaments, and both the one and the other might be either written or nuncupative.

SOLEMN TESTAMENTS]. So unnatural and contrary to all principles did it seem at first to the people of Rome, to disinherit the heir of blood either totally or partially, that in the early ages of their state it could not be done, but by an express law (5). One law, that of descent, could only be counteracted by another, that of wills ; the people were, therefore, solemnly interrogated in the *Comitia Calata*, whether they chose to ratify a will ; if they did, it became legal (6).

With the twelve tables, the power of transmitting property by will began, and they gave to

(4) Our devises of real estate may be compared to the solemn wills of the Romans, on account of the solemnities prescribed by our statutes of frauds ; and our wills of personal estate (as not requiring the legal precautions of the statute), to their unsolemn testaments ; but a perfect analogy will by no means hold. For instance, devises of land do not appoint an heir, nor create a representation, nor make the devisee stand in the place of devisor, as to all debts, and therefore differ widely from Roman wills.

(5) There was one exception from necessity entitled the mode *in procinctu*. Coriolanus found his army declaring to each other their wills, on the eve of a battle, with their garments tucked up ; that is *in procinctu*. Plutarch's Life of Coriolanus.

(6) From hence the principle *testamenti factionem esse juris-publici*. See Heineccius on the Inst. 161.

every paterfamilias this power of willing (7), but prescribed no form.

What then was to be done? The twelve tables had, in this respect, counteracted the first principles of law and the most rooted opinions, or perhaps prejudices of mankind (8). The lawyers found a medium (9); they considered wills in the same light with alienations *inter vivos*, as our laws do regard wills of real estate, and introduced cere-

(7) So in these countries a right to devise lands was not a common law right, but founded on statutes, as is said in the case of Ansty and Dowling; but in Windham and Chetwind, a case equally well known to every lawyer, Lord Mansfield observing, that a power of willing ought to be favoured, and naturally follows the right of property, adds, it subsisted in this kingdom before the conquest, and till about the reign of Henry the Second, when it ceased by consequence of feudal tenure, not from any express prohibition. The doctrine of uses revived it—the statute of uses again accidentally checked it—this occasioned the statute of wills.

(8) Yet one would have supposed, from the Roman prepossession for the paternal power, that their prejudices would have inclined the contrary way.

Lord Mansfield has observed, that the testamentary power over property is more reasonable in these kingdoms than ever it was among the Greeks and Romans, since by reason of primogeniture, and other exclusive rules of descent, the succession ab intestato amongst us is not so equal and universal as among those people.

(9) *Inveniendus erat color*, says Heineccius, *quo juris analogia servetur*.

monies corresponding to this fiction; the will was said to be made per æs et libram; it was a fictitious sale, the testator sold the property in the presence, and as it should seem with the approbation of five witnesses present, who represented so many classes of the Roman people.

There was also an antistes, who witnessed their concurrence, and the libripendens, who weighed the copper money given for the imaginary purchase by the familiæ emptor, making the necessary number of persons present (besides the parties) seven. The familiæ emptor was the devisee or hæres factus. He paid over a piece of money to the officer who held the balance, to be paid over to the testator (10).

In progress of time the prætors (who were always employed in simplifying and softening the strict and harsh requisites of the ancient laws) ratified a more simple form of testament, without any symbolical sale, or rather they gave the *bonorum possessionem* according to the testament, with some similitude to our administration *cum testamento annexo*.

If, then, the hæres factus could not set up the testament as agreeable to the ancient forms, he applied for aid to the prætorian court (11).

(10) The prætorian testament, says Heineccius, was improperly so called, because it did not carry with it the inheritance, but only the *bonorum possessionem*.

(11) Among savage nations, observes Mr. Gibbon, want of letters is imperfectly supplied by the use of visible signs,

All that the prætor required was, that seven witnesses should set their seals to the will: they represented the ancient five witnesses superadded to the antistes and libripendens.

At length, new imperial constitutions having been enacted, testaments began to be held valid, avowedly as testaments (not as sales or alienations *inter vivos*), though made in a manner different from any of the modes above mentioned, if made by persons capable of testation, and of things capable of being devised, according to certain rules, and with certain solemnities borrowed from the ancient rites, partly framed out of the Prætorian Edicts, and partly ordained by the Imperial Constitutions (12). From the ancient law was derived the necessity of witnesses—and their presence at one and the same time without interval. The number of these witnesses, and their putting their seals, were circumstances fixed by the Prætorian Edicts, and the Imperial Constitutions required the subscription of the witnesses and of the testator: Justinian himself added the necessity of the testator's heir's name being inserted in the handwriting of the testator, or at least by the witnesses (13).

like a pantomime. Rome, in its earlier periods, though not in a savage state, was in a very rude one. Imaginary sale was used among them in alienations, adoptions, and almost every species of change of property.

(12) These, if followed, rendered all application to the prætor unnecessary.

(13) Inst. I. lib. 2. tit. 10. sec. 3 & 4.

I shall now proceed to analyse and discuss more particularly these requisites in the form and manner of making testaments, postponing for that purpose, at present, the consideration of who could make wills—of what they could be made, &c. &c.

FORM AND MANNER OF MAKING SOLEMN WILLS ACCORDING TO THE CIVIL LAW.

The solemnities required were either internal or external. The internal was the appointment of an heir which was of the essence of the testament, and without it the will might be a codicil, but could not be a testament (14). The external were signing, attestation, unity of the act.

(14) This idea that the naming of an executor is of the essence of a testament, was formerly recognized by the judges of the common law; but they have since considered a will, in which no executor is named, as effectual to all intents and purposes. Noy. 12.

We may here observe how impossible it is to form any complete analogy between our wills, whether of real or personal estate, and the testaments of the Romans. Our devises of real estate, in respect to the solemnities attending their execution, may admit a fair comparison with their solemn testaments; but the appointment of an universal heir, considered as partaking individuality with the testator, subject to all his debts even so as to affect his own property, being no part of the essence of our devises, here appears a manifest and great variation.

SIGNING]. The subscription of the testator appears to have been necessary from Inst. 2. 10. 3. and from the same authority we collect, that it was first required by the Imperial Constitutions. Dr. Harris refers it to a particular constitution of Theodosius, which does not seem to me perfectly to justify his position (15).

If the testator, through ignorance or imbecility, was incapable of signing the will, an additional witness was called in, whose substituted signature authenticated the instrument; but if the devisor had actually written the body of the will with his own hand, his signature at the conclusion became unnecessary (16).

Our wills of personal estate, on the other hand, while the old opinion prevailed that the appointment of an executor was of their essence, might be compared in that respect to the solemn, and in not requiring certain solemnities to the unsolemn will of the Romans. Even now they cannot altogether be compared to the unsolemn at Rome, for the latter required the appointment of an heir.

(15) See Harris's notes on Justinian's Inst. lib. 2. page 46. The Constitution of Theodosius is repeated in the Code, b. 23. 21. It relates to the circumstance of a testator's chusing to conceal the provisions of his will from the witnesses, and declares such secrecy shall not invalidate it, provided the requisites therein are complied with, in whose enumeration the testator's signature occurs. Our law agrees.

(16) Our law agrees. Lemain and Stanley, 3 Lev. 1. It was at one time very absurdly judged, that testator's writing his name in the beginning of the will supplied the

The testator was not obliged to put his seal, though the witnesses were (17).

The matter on which the will was written was immaterial, whether *tabulis*, *charta*, *membranis* &c., on tablets of wax, paper, or parchment, Inst. 2. 10. 12. By a particular provision of Justinian mentioned above, the will was not only to be signed by the testator, but also the name of the devisee, or heir appointed, must appear in the hand-writing of the testator himself, or of one of the witnesses (18); and though the testator, instead of writing the will himself, might dictate it to another, yet if the writer was the heir or legatary, he was subject to punishment for the deed (19).

ATTESTATION]. I shall next consider the number and capacity of the witnesses required, to-

want of signature at the bottom: a determination mentioned by Blackstone without disapprobation, but very justly censured by Dr. Christian.

(17) Nor is he by our law; but sealing without signing was held sufficient in *Strange*, 764. 1 *Wilson*, 313. and 2 *Vesey*, 459. *contra*.

(18) See Inst. 2. 10. 4. Cod. 9. t. 23. l. 29. Novels, 119. ch. 9.

(19) Code 9. 23. 3. And the passage says, that writers of wills, who had inserted any benefit to themselves, should be subject to the punishments of the Cornelian law. This was the Cornelian law *de falsis* (there was another *de fidei*); its punishments were death to slaves, to freemen banishment and confiscation of goods.

Notwithstanding this caution, the legatary might be a witness to the will, as we shall see presently.

gether with the mode of their attestation prescribed by law.

The number was no less than seven to a solemn will, a number appearing to be determined in its origin by the classes of the Roman people, and by the fictions of the symbolical sale (20).

The difficulty which must frequently have occurred in obtaining so great a number of witnesses as seven, might probably induce the Romans to be less strict than we are (as they certainly were) as to the persons whom they admitted upon this occasion. At one time the heir was admitted as a witness, though forbidden to be so by Justinian (21); but legataries were always admitted on this distinction, that they were particular, not universal successors, *Qui non juris successores sunt*; and that a testament would be valid without legataries,

(20) Every one knows that the statute of frauds requires three witnesses to a will of real estate, and that to a written will of personalty the signature of witnesses, though safe and prudent, is not indispensably necessary: nor even the signature of the testator, though the will be in another man's hand-writing, if proved to be according to his instructions, and approved by him. See 2 Bl. Com. 501. Two witnesses to a will—two to a codicil reciting that will, one of which last was also a witness to the will.—It does not satisfy the statute. 3 Salk. 395.

(21) See 1 Burr. 426. The essence of the Roman testament was the appointment of an heir to represent the testator, not according to our ideas of representation, but in the mode already sufficiently explained in the chapter of Descent.

though it could not without the appointment of an heir: the objection to the heir as a witness not proceeding, according to great authorities, from his being interested, but, as is said by Justinian, being a prohibition, *ad imitationem pristini familie emptoris; quia hoc totum negotium testamenti ordinandi gratia creditur hodie inter testatorem & hæredem agi* (22). In short, the heir was a party to the supposed contract, and therefore could not be a witness: the legataries were not.

The witnesses must have been freemen, Roman citizens, adults, or at least of the age of fourteen years, *testabiles*, i. e. *Quibuscum erat testamenti factio*; and not members of the family of either heir or testator. The three first of these requisites require no new explanation: but the fourth, as expressed by the Roman law, may be misapprehended. The phrase *quibuscum erat testamenti factio* did not mean who could make testaments (for a woman could make a testament), but who could be present at the comitia calata, where testaments were originally made: this in itself excluded slaves, minors, those deaf, dumb, and blind, prodigals and infamous persons; to which are added the insane, if insanity could require any exclusion but that created by common sense.

Of freedom from these incapacities, and of the witnesses being in situations which rendered them competent, general reputation was sufficient evidence. Thus, if a reputed freeman, but real slave,

(22) Inst. lib. 2. tit. 10. See 1 Burr. p. 426.

happened to be a witness, the will was not thereby invalidated. 2 Inst. 10. 7.

All the branches of the families of heir and testator were excluded, upon principles connected with the fictitious sale, viz. because they were supposed to be parties to the contract; and although the symbolical mode became obsolete, the rule was retained (23). All persons in testator's power, or among his domestics, excluded. 2 Inst. 10. 9.

Having thus mentioned five requisites to the competency of a witness to the Roman testament (24), the reader might naturally expect some dif-

(23) *Ad imitationem pristinæ emptionis.*

(24) I hope the student will not think me departing too much from my subject matter, or performing an idle task, in abridging here the famous controversy between Lord Mansfield and Lord Camden on the competency and credibility of witnesses to a will, the substance of which it generally gives some trouble to young men to collect.

Witnesses were not especially necessary to a will of real estate, before the statute of frauds; that statute required the subscription of three *credible* witnesses. The word *credible* was an unfortunate word, and has occasioned much dispute, which the use of the word *competent* might possibly have prevented.

Hence, in the case of *Ansty and Dowling, Strange, 1254*, the question arose, whether the witnesses to a will answered the description in the statute. The case was this: James Thompson made his will of real estate, attested by three witnesses, and gave to one John Hailes and his wife ten pounds each for mourning, and an annuity of twenty pounds to Elizabeth, the wife of John. John Hailes was one of

cussion of objections arising to their competency or credibility from their being interested ; but here, in the opinion of no less a judge than Lord Mansfield, all enquiry is useless, since he has decidedly

the witnesses to the will, and refused to be paid twenty pounds in lieu of his wife's legacy and his own : it was determined that the witnesses to a will should not be persons who are entitled to any benefit under that will, and that John Hailes was not a good witness.

This case gave rise to the statute 25 Geo. II. ch. 6. in England, and ch. 11. in this kingdom, which declare all *legacies* given to witnesses to be void, and thereby remove all possibility of interest affecting the testimony of legatees named, and directed the testimony of all *creditors* to be admitted, leaving their credit to be weighed by the court and the jury.

How the case of Windham and Chetwind, which was that of simple contract creditors witnessing a will which charged the real estate with payment of debts, could occur after this statute, does not at first sight appear ; but I suppose it was under the exception in the act relative to suits already instituted, the proceedings in that case appearing to have been commenced in August, 1750, and the retrospect of the act being only to June, 1752.

In that case, in which the witnesses had been paid off, before the trial, and which is reported in 1 Burr. 414, Lord Mansfield is of opinion, that the word *credible* in the statute is either superfluous or absurd : if it means competent, superfluous ; if it means something more than competent, absurd, because it would make the validity of a will depend on the credibility of the witnesses, which would be absurd, since the testator never could foresee what credit might hereafter be given to them. As therefore competency only

laid down this position, that though in other cases the objection of interest to a witness was allowed, yet it did not incapacitate witnesses to a will by the civil law.

was required, he was also of opinion that such competency might be acquired subsequently to the attestation, as by payment, release, &c. &c.

In the case of *Hindon and Kersey*, 5 Geo. III. 1765, (which was the case of a devise towards the support of the poor in a certain township, to which two persons liable to be assessed to the poor tax in said township were witnesses, and which case was not cured by the act 25 Geo. III.) Lord Camden held that the word *credible* in the statute exactly means competent, and that to give it another meaning, viz. that of credibility in the ordinary sense of the word, would be absurd. So far he agrees with Lord Mansfield; but as to its being a superfluous word, he differs widely, and the tenor of his argument is, that it was inserted to mark that this competency must exist at the time of the attestation, and cannot be acquired by any subsequent act, such as a release; and that the contrary doctrine held by Lord Mansfield in *Windham and Chetwind*, originated in his considering this word as superfluous, or having no legal meaning.

Lord Camden held, that the word *credible*, in the statute of frauds, meant competent. Lord Mansfield, that if it did not mean that, it meant nothing; so far they agreed: but herein they differed, that Lord Mansfield said it was a superfluous word (its meaning being included in the word witness); and also that witnesses, though incompetent at the time of the attestation, yet if they became competent afterwards, were good witnesses to the will. Lord Camden held, that they must be competent at the time of the

I have not courage to oppose that very great and most learned judge upon the point, though I think I see authorities to the contrary; and it surely is an exception very inconsistent with the usual wisdom of the civil law, which appears to shew a laudable jealousy upon all similar occasions.

Lord Chief Justice Lee was of that opinion, though mistaken in his authorities. Quoting the following paragraph from' Dig. lib. 28. tit. 1. c. 22. (*conditionem testium tunc inspicere debemus, cum signarent, non mortis tempore*), he argued from thence, *that interest was an objection*, which, if existing at the time of subscribing, could not be taken off by any subsequent fact; but Lord Mansfield has shewn, that *conditio testium* means

attestation, and that to mark this very thing, the word *credible*, as an emphatic word, was inserted.

Want of attention to the plain truth uttered by Lord Mansfield in *Windham and Chetwind* (that to make the validity of a will depend upon the credibility of witnesses, which the testator cannot foresee, is absurd), produced in the remarkable cause of *Newburgh and Burroughs* (tried in Ireland about ten years since) this notable argument. A witness to the will then in question swore on the trial to alterations made without the testator's knowledge. It was insisted, that if the jury believed him, it was not the testator's will, and if they did not believe him, he was not a credible witness, and the will therefore void for want of three credible witnesses, a mode of reasoning so comical, that none but the bye-standers could have thought the framer serious. Yet I have since known jurymen of great ability, in a very celebrated cause, caught in the same trap.

the positive capacity of the witnesses, their rank or quality, their condition of citizenship, freedom and puberty (25).

MODE OF ATTESTATION]. I shall begin by taking notice of two regulations peculiar to the civil law; the one, that the witnesses should be specially required by the testator to witness the will; the other, that the whole perfection of the will should be done *uno contextu*.

The first rule requires no explanation, and is a circumstance which, amongst us also, must always be of weight, as shewing more particularly the solemn deliberate intention of the testator, but which is not of indispensable necessity (26). The latter rule means that no foreign act should intervene; and this principle of *uno contextu* was carried so far, that wills were frequently set aside for the most immaterial variation from it; for instance, for the testator's retiring from the room for the shortest interval, until Justinian provided, that such short accidental intervals occasioned by the momentary absence of him, or of one of the witnesses, before

(25) If there was no other instance to prove the great utility, even in our common law courts of a superior knowledge of the civil law, and of its technical Latin, this mistake of Chief Justice Lee, and its correction by Lord Mansfield, would be conspicuous.

(26) The stupid silence of the testator, while another in his presence required the witnesses to attest, might be a strong ground of suspicion; but mere silence, where sanity undoubted, would be construed simple acquiescence,

the act completed, should not invalidate the will.
C.6. 23. 27.

The next requisite was, that the witnesses should be all assembled together, and that they should subscribe in the sight of the testator, and see him sign, and hear him acknowledge and publish the same: and all the witnesses ought to sign at the same time, and in the same place, and in the sight of each other. Code 6. 23. 28. Ayliffe, 355. Wood, 124. Halifax, 34. (27).

(27) The vast variety of cases which have been determined in our courts upon these points, as to wills of real estate, it does not come within my province as commenting upon civil law to delineate. Suffice it to observe, that the witnesses must, by the statute, sign in the presence of the testator, and must see him sign or acknowledge his signing; but this they may do at different times, and therefore need not see each other sign, as appears from the case of Jones and Lake, 2 Atkyns, 176.

N. B. When I have said that by the statute of frauds the testator must sign in the presence of the witnesses, I speak according to what has been generally understood to be its meaning; for Mr. Douglas truly observes, that this most carelessly penned statute does not say he shall do so, though it obliges the witnesses to subscribe in his presence, and *e contra*, when regulating revocations of wills, it omits to direct the subscription of witnesses in his presence, but expressly prescribes his signing in theirs. The statute is said to have been injudiciously put together from some loose notes of Lord Hale after his decease, and not by himself, as vulgarly imagined.

Query, May not, however, the direction to sign in their presence have been purposely omitted, to enable him to ac-

The last requisite was sealing, a mode of authentication which seems to have anteceded the custom of signing; and was, as Sir William Blackstone has observed, in the civil law, the evidence of truth, and required, on the part of the witnesses at least, at the attestation of every testament (28), but was not necessary that the seals should be their own, except in the case of a notary. Nov. 73. ch. 5 and 6.

SOLEMN NUNCUPATIVE WILLS]. What I have hitherto said hath related to solemn written wills; but there is no material difference in solemn nuncupative ones, in respect of the solemnities, ex-

knowledge a previous signature? Three signings, one in the presence of each witness, will not do. 1 Vesey, jun. 16.

The witnesses to a will, says Lord Mansfield, 1 Burr. 421. need not know the contents, need not be together, need not see the testator sign it; it is sufficient if he acknowledges his signature; he may deliver it as a deed. The last position determines that publication of it, as his will is not necessary; a point much disputed in Wallis and Wallis, and Trimmer and Jackson, in the beginning of the present reign. But to enable any one of the witnesses singly to prove the will, he must be able to shew that the others signed in testator's presence, and therefore must have seen them sign himself. See Longford and Eyre, 1 P. Wms. 174.

(28) See 2 Black. Com. p. 305. where the learned commentator observes on the antiquity of this solemnity among the Persians and Jews, &c. &c.

It is observable, though among us sealing from the Norman æra was always required to a deed, yet signing was not, until the statute of frauds. Ibid.

cept what necessarily arose from their not being written ; that is, as they were not necessarily at any time to be reduced to writing (29), subscription and sealing of course did not apply to them : but seven witnesses were required, able to give clear and undoubted testimony of their having been present, and having heard the testator declare his will and nominate his heirs.

Before I dismiss the subject of solemnities, I cannot omit to insert the judgment of Lord Mansfield upon their validity in general. He held, that courts of justice ought rather to lean against than in support of these rigid formalities ; and declared his opinion in the above-mentioned cause of Windham and Chetwind, that more fair wills had been destroyed for want of observing the restrictions

(29) With us, nuncupative wills must be reduced to writing within six days after the making ; otherwise, after the expiration of six months, no testimony can be received to prove them : and if the estate bequeathed exceed thirty pounds, there must be three witnesses, requested by the testator to witness the same, and it must be in his last sickness, and in his dwelling-house, or at least where he has been resident ten days before the making, except he were taken sick while from home, and died before his return *, otherwise the will is invalid. By way of further caution, probate cannot be granted of any nuncupative will till fourteen days after testator's decease, nor without citing

* I take the words of the statute, but surely a man *dying before his return* is a legislative blunder, and Mr. B. very probably says, dies *without* returning.

fixed by the statute of frauds, than fraudulent wills obstructed by its caution: adding, that in all his experience at the court of delegates, he had never known a fraudulent will, which was not legally attested. To this Lord Camden answers, that he has no doubt many fraudulent wills have been made since the statute, and all formally executed. But who can tell me, says he, how many have been prevented? The design of the statute was to prevent wills that ought not to be made, and it always operates silently by intestacy. If a law is to be slighted, because it doth not entirely eradicate mischief, no law can escape censure. Such were the opposite sentiments of these two great and eminent judges.

UNSOLEMN PRIVILEGED WILLS.]—The strictness which we have just ceased to describe was dispensed with by the Romans in numerous cases. The officious testament of a father bestowing his property on his children, and all in his own handwriting; the dignified will acknowledged before the prince, honoured by his presence, and receiving his imperial sanction; the rude bequest of the ignorant rustic; and the hasty testament of the victim to general contagion; might be unsolemn, and were privileged and exempt from the necessity of the usual formalities (30). In some of these

either the widow or next of kin. 7 Will. III. ch. 12. in Ireland; 29 Charles II. ch. 3. in England.

(30) See for all these, the sixth book of the Code, tit 23.

cases five witnesses were sufficient, in others more were required; the literate might subscribe for the unlearned, and the cotemporaneous presence of the whole number was dispensed with: but above all, the military testament of the gallant but unlettered and endangered (31) soldier, claimed peculiar immunities for honourable service and perilous exertion; he might write it in his blood upon his shield, or inscribe it in the dust with his sword (32); he might dictate it to his comrades in the hour of danger, and depend upon the survivor to transmit it to his country. No certain number of witnesses, nor even any formal witness whatsoever, were required to his testament, if his intention could be proved to have been expressed either by word or writing; no special requisition to the witnesses, no subscription or sealing on their part, no specific positive quality in them (for even women and aliens could be witnesses to the soldier's will), were demanded by the law. Nor were his privileges confined to the manner of the testament; in the matter he had special exemptions. He might die partly testate, partly intestate (33): though

(31) The statute of frauds excepts from its regulations respecting wills, whether written or nuncupative, soldiers in actual and military service, and mariners or seamen being at sea.

(32) Code, b. 21. 15.

(33) He was not subject, says Wood, to the subtilty of the fiction, that the testator could not be represented in part.

still under paternal power, he might dispose by will of property acquired by military service. He might die with more wills than one: his will could not be inofficious, i. e. his children might be passed by, without express exclusion by name: but these honourable distinctions were not attached to the name of soldier; he must be in actual service and in present danger; and though the testament thus hastily made, and from necessity, was valid even if he was disbanded, for one year next following such his dismissal; yet his departure from the army must have been attended with honour, and disgrace was followed by deprivation of privilege. Such and so great was the attention paid by this military nation to the protectors of the state abroad (34).

CODICILS.]—A codicil (35) in the Roman law meant not, as with us, an appendage to the will; it meant a last will standing by itself, and not annexed to any thing preceding, yet not ac-

(34) The canonists, says Lord Chief Justice Gilbert, have expounded wills of personality, like the *testamenta militaria*, according to the intent. Treatise of Equity, 2 vol. p. 329. on which Mr. Fonbl. remarks, it might be inferred from hence, that the *testamentum militare* was the only will which by the civil law was construed according to the intent, which is not true; for though the *testamentum militare* was one of the privileged descriptions of wills, its privileges were merely dispensations with certain solemnities essential to the validity of other wills.

(35) Upon this subject consult Inst. lib. 2. tit. 25.

known to be a testament *for want of the appointment of an heir*; it was therefore defined an unsolemn last will, in which no heir or executor is named, and might be either written or nuncupative. The maker of a codicil, or codicils (for he might make more than one), might die either testate or intestate. In the first case, that is, if he had also made a testament, it did not affect the codicil: that remained valid, even though it preceded the testament, and was not confirmed or mentioned by it, provided it was not actually revoked or contradicted thereby; in the latter the codicil was a direction to the heir by descent, who acted like an *administrator cum testamento annexo*.

The Inst. 25. 3. says, that codicils required no solemnity. They must mean, says Harris, no *extraordinary* solemnity, for five witnesses were required, the number necessary upon several other occasions (36); but the five witnesses might be accidentally present and not required thereto, and they might even be of the female sex.

Though in a codicil an heir could not be instituted directly, yet an heir already instituted by testament, might by codicil be declared a bare trustee; but testamentary heirs could not be disinherited by codicil, nor made conditional, if before absolute; and a plurality of codicils, though not of testaments, was allowed, because it was essential to a testament that it should convey away

(36) Code, b. 36. c. 8. and 4. t. 20. c. 18.

the whole inheritance, otherwise the heir would not stand completely in the place of the ancestor, whereas codicils only convey several particular legacies.

In the 25th chapter of the second book of the Institutes, a curious account is given of the origin of codicils, occasioned by the difficulty on a journey, a voyage, or an embassy, of finding seven witnesses, all Roman citizens. Their æra was that of Augustus—their introducer Lucius Lentulus, and the emperor consulted the learned Trebatius (37) upon their validity.

Having now done with the different kinds of testaments, and the form and manner of making them, I shall treat of the remainder of the subject under the following heads.

I. WHO COULD MAKE WILLS.

II. OF WHAT THEY COULD BE MADE.

III. OF THE INSTITUTION OF THE HEIR, HIS RIGHTS AND DUTIES.

IV. OF THE QUASI HÆRES OR EXECUTOR.

(37) *Deſſe Trebati*. Hor. If we might judge from this caution and attention to the laws in Octavius Cæſar, we ſhould not be inclined to join in the ſevere cenſure paſſed on him by Sir W. Jones, who ſays, “when that baſe diſſem-
“bler and cool-blooded aſſaſſin C. Octavius gave law to
“millions of honeſter, wiſer, and braver men than himſelf,
“by the help of a profligate army, and an abandoned
“ſenate.”

**V. OF THE INTERPRETATION OF WILLS,
AND CONSTRUCTION OF LEGACIES.****VI. HOW WILLS MIGHT BE AVOIDED.****VII. OF PROVING THE WILL.****VIII. OF THE BONORUM POSSESSIO AND
ADMINISTRATION.****IX. OF THE COLLATIO BONORUM.**

First, WHO COULD OR COULD NOT MAKE A TESTAMENT.]—Every person had full power and (38) liberty to make a will that was not under some special prohibition by law ; the persons prohibited were, however, minors, persons under the paternal power, the insane, the deaf and dumb, the blind, the prodigal, the prisoner of war, aliens, and criminals ; but these prohibitions must, with respect to some of them, be a little qualified. We have already qualified the restriction on the son under paternal power, by an exception for military service : we must add, that the prodigal was only forbidden, while his conduct retained him under the specific interdiction of the law from meddling with his property ; and the blind might pronounce a nuncupative will, and even dictate a written one, if afterwards read to him and acknowledged by him before witnesses.

The deaf and dumb must be completely and not partially so, and must have suffered these deprivations from their birth ; the alien was permit-

(38) See 2 Inst. title 12.

ted in the later times of the empire, and the criminal must have been guilty of capital crimes, such as treason, murder, or some other grievous offences, such as heresy, manifest usury, and libelling, which the civil law ranks among the most abhorred enormities (39).

The case of the prisoner of war was peculiar ; if his will was made during his captivity it was invalid, notwithstanding his future liberation ; but if executed antecedently to his imprisonment, it was set up by the *jus postliminii* if he returned, by the *Cornelian law* if he died a captive.

As to the case of the minor under puberty, I have only to observe, that his testament did not become valid, though he arrived at puberty before his death (40).

(39) The horror with which the Roman law considers libelling, and the severity with which it was punished, is very remarkable. If the libel charged a crime punishable with death, the author himself was capitally punished ; if it affected only reputation and not life, the composer of it was incapacitated to give testimony or to make a will ; and originally, by the twelve tables, *all* libels were punished with death.

(40) Nor does it with us as to lands if he dies, without the republication of it before twenty-one, 1 Siderfin, 162. T. Raymond, 84. The same is the law as to personal estate ; for the rules of the civil law hold with us, as to the capacity or incapacity of minors, to make wills of personal estate. So that boys under the age of fourteen, or girls not arrived at twelve, cannot make wills of personal estate.

The rule of the civil law, with respect to insanity in the testator, must agree with ours, because both agree with common sense. Subsequent insanity did not validate a will made while in whole mind, nor return to reason that declared during the furor: a will made in a lucid interval was to be established (41); and the extraordinary maxim of our law, that a man shall not himself do away an act performed during his insanity, i. e. shall not stultify himself, is peculiar to our institutions.

The restriction on the prodigal, so novel to our feelings, must have caught the attention of every reader; and its non-application under our constitution, has been well accounted for by a learned commentator often quoted, whose observations thereon will be found in the note beneath (42).

(41) If a lucid interval be alledged, the burthen of proof attaches on the party alledging it; if derangement be alledged, it is clearly incumbent on the party alledging it to prove such derangement. See Fonb. vol. i. p. 66.

(42) The law of England, whilst it anxiously protects the interest of those, whom the infirmities of disease or imbecility of age render incapable of protecting themselves, respects the right which every individual of a free constitution claims, and which, indeed, the very nature of a free constitution seems to require, that of disposing of his property as he thinks fit, provided he, in so doing, consults the rights and claims of others; the only restriction prescribed by the law of England in such case being, "*Sic utere tuo ut alienum non lædas.*" The civil law, however, extended its views and protection to persons, whose prodigality might not only prejudice their own interests, but those of their

It must be noted, that the interdiction of the administration of his goods did not affect a will made previous thereto.

The student will also observe, that though women were prohibited from witnessing wills, they were suffered, whether married or single, to make them (43), which seems to shew that their want of power to attend the Comitia Calata, the reason usually given for the former is not the true one, since it would equally extend to the latter privilege. Perhaps the true reason for their inability to attest, was the supposed imbecility of the sex, which prevented their being called where the choice of witnesses was voluntary.

offspring; and we find the authority of the prætor frequently interposed, to restrain the extravagance of the individual. "Solent præterea si talem hominem invenerint
 "qui neque tempus neque finem expensarum habet, sed bona
 "sua dilacerando et dissipando profundit, curatorem ei dare
 "exemplo furiosi; et tamdiu erunt ambo in curatione
 "quamdiu vel furiosus sanitatem vel ille bonos mores receperit. Ff. 27. 10. 1. furiosi vel ejus cui bonis interdictum
 "fit nulla voluntas est." Digest lib. 50. tit. 17. reg. 40. Fomb. Treatise of Equity, vol. 1. p. 41.

(43) With us a married woman is utterly incapable of making a will of lands, or even of chattels, excepting with the husband's consent, unless they have been given to her for her sole and separate use, or are in her possession *in autre droit*, or are the savings out of a separate maintenance; but with the assent of her husband she may make an appointment as to personalty, in the nature of a testament, which shall repel the husband from administration, and give it to her appointee.

II. WHAT THINGS COULD OR COULD NOT PASS BY WILL.]—I have already, in various places, mentioned some of the most remarkable of these; such as the goods of the church, the property of corporations, the *fundus dotalis* and *paraphernalia* of the wife, and those things which were not *in commercio*, e. g. such as are called public.

Property acquired subsequently to the making of the will passed by it; if the bequest was universal, of all the property, or the thing bequeathed universal, as a *whole* flock of sheep, or a herd of cattle (44); but in particular legacies, the date of the testament, and not the time of the death, was to be regarded. See Swinburne, part 7. sec. 11. and Treatise of Equity, book 4. part 1. c. 1. f. 13.

It was an extraordinary provision of the Roman law, which enabled the testator to bequeath a thing not his own, the meaning of which was, that his heir was obliged to purchase and deliver it, or to render the value of it, if it could not be purchased; but if the thing was incapable of alienation, the bequest was void. And even if the legatee had purchased such bequeathed property of

(44) Inst. lib. 2. tit. 20. sec. 18 and 19. Our law agrees as to personal estate, but differs as to real, from the principle that a devise of real estate is considered as a conveyance, declaring the uses to which the land shall be subject, and therefore without republication, after purchased estate does not pass. Salk. 238.

another, he might recover the value *ex testamento* (45).

A man might also bequeath things which did not exist, provided there was a possibility of their existence; as the fruits which should grow on a particular spot of ground, or the offspring which should be born of a particular slave (46).

If a man bequeathed a thing which he had pledged to a creditor, the heir was under a necessity of redeeming it (47).

Upon the whole, then, all things were capable of being bequeathed that were *in rerum natura* existing, or which might so exist, whether corporeal or incorporeal, moveable or immoveable, the testator's own, or belonging to the heir, or to another person, provided they were such things as lay in commerce, and might be purchased.

III. OF THE INSTITUTION OF THE HEIR, HIS RIGHTS AND DUTIES.]—I must

(45) 2 Inst. 20. 4. Swinburne will have our law to be the same. Swin. 188.

(46) 2 Inst. 20. 7. So with us, according to Swinburne, p. 18. If a man bequeathes trees or grafs growing on an estate, of which he was seized in right of his wife, his bequest will not pass, because he cannot bequeath the trees, which are parcel of the freehold, and descend with the land to the heir; but he may bequeath the corn growing thereon, because that is parcel of his own goods.

(47) 2 Inst. 20. 5. One that hath money to be paid to him on a mortgage, may demise this money when it comes. Godol. O.L. 391.

here recal the attention and recollection of the reader to the signification of the Roman heirship, as formerly explained in the chapter of Descent, and request him to apply whatever was there said of the natural heir, or heir by descent, to the instituted heir also, or heir by will. The heir was by fiction of law supposed to be the same person with the deceased; and all rights, duties, and actions, which were vested in the testator, or to which he was liable, immediately affected the heir, not only as far as he had effects by descent, or property by devise, but as far as he had any substance in the world of his own, as well as accruing to him from the testator.

The consequence of what has been said was, that no man would hastily take upon him the heirship, till he had well considered whether the estate was or was not more than sufficient to pay the ancestor's or testator's debts, and whether he should gain or lose by the undertaking. The persons instituted heirs might be the children of the deceased, called *sui hæredes* & *necessarii*, natural and necessary heirs; or his bondmen, called *necessary* only; or strangers and volunteers: the bondman could not refuse, and in return obtained his freedom of course. The child, by the laws of the twelve tables, could not refuse (48), but was af-

(48) *Sui quidem hæredes ideo appellantur, quia domestici hæredes sunt, & vivo quoque patre quodammodo domini existimantur. Neccessarii vero ideo dicuntur quia omnino, sive velint, sive nolint, tam ab intestato, quam ex testamento, ex lege*

terwards indulged, if he had not intermeddled with the effects (49), or even if he had, provided he was a minor ; the stranger of course had his free option.

The method of proceeding then in later times was this (50): the law did not appoint any certain or definite time within which the heir was to take the heirship on himself, and until he did so, the inheritance was called *hæreditas jacens* ; but the creditors of the deceased might convene him to declare, whether he would prove the will (51), and take the heirship on himself or not ; being thus called upon to determine, a stated time was given him, at least one hundred days, to deliberate and examine the circumstances of the de-

12 tabularum hæredes fiunt, sed his prætor permittit volentibus abstinere hæreditate, ut potius parentis quam ipsorum bona similiter a creditoribus possideantur. Inst. lib. 2. tit. 19. sec. 2.

(49) *Impuberibus liberis omnimodo abstinere ab hæreditate potestas fit ; puberibus autem ita, si se non immiscuerint. Dig. 29. tit. 2. 11.* a rule similar to that affecting our executor de son tort.

(50) Besides the Institutes, the student should read on this subject, the whole fifth title of the 28th book of the Pandects, *de hæredibus instituendis*, and the second title of the 29th of the same, *de acquirenda vel omittenda hæreditate*.

(51) As he may with us cite the executor to prove or renounce.

ceased, which privilege was called the *jus deliberandi* (52).

The situation of the instituted heir still continued, however, to be extremely embarrassing and perplexing: he was obliged either to accept the inheritance simply, or renounce it altogether. He might be mistaken in the circumstances of the deceased, and the mistake might end in his ruin. Justinian was the first who cured these defects, and reduced matters to a footing of common sense: he allowed the heir to make an inventory, and return it to a public officer, containing a full, true, and perfect account of the testator's goods; upon doing which he was answerable as far as the contents of the inventory, but no further.

The heir might accept the heirship either by express words, which was called *aditio hæreditatis*, or by intermeddling, *vendendo prædia colendo, locandove*, when he was said *pro hærede se gerere* (53). If the heir refused to accept the heirship, he could not afterwards claim it (54), at

(52) *Rektor provinciæ aditus si hæreditate necdum sunt obligati, eos an hæredes sint interrogare debet; si tempus ad deliberandum petierint, moderatum statuet.* Code. b. 30. 9.

(53) 2 Inst. 19. 6.

(54) With us, if one executor proves the will it suffices for all; and any other executor in the common law courts, after renouncing, is still allowed to come in and prove; by the civil law he is not: but to prevent a clashing of jurisdictions, the ecclesiastical courts in modern practice in Ire-

least not after a certain period elapsed. Code, b.^{aa} 31. 6. and, if he died before acceptance, the right was not transmitted to his heir (55).

The delicacy of the civil law in admitting persons to the heirship, produced numerous exceptions to the acquisition of this right; for want of citizenship, aliens; for defect of probity, apostates, heretics, traitors, libellers, convicts; were incapable of being heirs: women were excluded by the Voconian law, but I do not find infants among the prohibited (56). The adulterers could not be heirs in the testament of the adulterer, nor e contra; restraints were laid on the testament of second nuptials (57): corporations were excluded, except latterly *through the intervention of trustees*; and as it was customary, in order to

land, and I suppose in England, generally allow it. See the famous case of Downs and Houle v. Lord Petre. Salk. 311. therefore a surviving executor must be cited again before administration can be granted to another; but *secus* if all the executors refuse *at first*, and administration has been granted. See 3 P. Wms. 251.

(55) So if executor die before probate, unless he be also residuary legatee, his right is not transmitted to his executor, but administration granted to next of kin. Swinburne, p. 396 and 477.

(56) The second husband could not take by bequest a greater portion than one of the children of the first marriage.

(57) The gods could not be made heirs, lest the priests should share. Ulpian Fragm. 25. 6. Heineccius Antiq. lib. 2. tit. 14.

maintain a bad title, to institute the emperors themselves, those princes, with Pertinax at their head, have in various parts of the civil law nobly disclaimed such insidious bounty; and Severus and Antoninus exclaim, *licet legibus soluti simus tamen legibus vivimus*, with an honest liberality in the conclusion of the adage, which may heal the stigma often thrown upon the civil law by its assertion in the commencement (58).

If there was no objection to the capacity of the persons, the testator might appoint as many heirs as he pleased, in equal or unequal portions; all of whom made but one person, and were said to be heirs of certain parts of the *A S*. They collectively represented the testator. The *A S*, which originally implied a pound weight of metal, and was at first only applied to money, was afterwards made by the Romans to denote an integral, or whatever consisted of parts or was capable of subdivision; so that *hæres ex affe*, when applied to estates and inheritances, must be understood of the man who sweeps all without a distribution; and this way of computation is constantly followed by the Roman writers when they consider inheritances; and the uncia, or twelfth part of the *A S*, was itself also considered as an integral, and subdivided (59).

(58) With us infants may be executors, but an administrator must be appointed during minority.

(59) Thus Julius Cæsar is said to have left by his last

If any parts were wanting, or remained undisposed of, so much was deducted or added to every heir; and if one was nominated heir of part only, the whole devolved or accrued to him, if no heir was instituted as to the rest, for none but a soldier could die testate and intestate; and the heirs thus taking were not answerable one for the other to creditors, but each in proportion to his own portion or share.

It was a very extraordinary provision of the Roman law, which suffered a person expressly instituted heir, to be set aside, after the death of the testator, for unworthiness; not that it can be supposed that his demerits were to be ascertained by common report, or subject to the tribunal of private scandal. The instances were ascertained by the law, and must be proved in a court of justice, and thought by the judges sufficient in degree to justify the deprivation. Such were occasioning the testator's death, or not prosecuting the authors of it, if of a violent kind, attempts to defame his

will, three heirs: C. Octavius was his heir *ex dodrante*, i. e. he had three-fourths of the *AS*; and L. Pinarius and Q. Pedius had the remaining quadrans, or one-fourth between them. The sextula was one-sixth of the uncia. Cicero mentions a woman who left Cœcina her heir *ex deunce et semuncia*, i. e. of eleven uncia and one-half; to Fulcinus she gave two sextulæ, to Œbutius one; so that if she died worth 1200l. of our money, the first would have had 900l. the second 33l. 7s. 8d. the third 16l. 13s. 4d. Taylor's — Elements of Civil Law.

honour and reputation, or other base ingratitude (60).

The institution of the heir might be absolute or conditional; an impossible condition was considered as null; if many conditions were jointly required, all must be complied with; if they were in the disjunctive, it was sufficient to obey any (61). But the heir could not be instituted from a certain time, or to a certain time (62).

The heir was allowed to pay himself the sums he had expended as heir, such as funeral expences, the charge of registering the will, or making the inventory; he was at liberty also to satisfy his own debt in preference, and to pay the creditor that came first (63); but he could not be called on to pay debts till nine days after testator's death (64).

(60) Do we not see in daily practice instances of ingratitude, and forgetfulness of the wishes of testators, which would make us almost wish this was the law of these countries?

(61) Inst. lib. 2. tit. 14. sec. 9. 10. 11.

(62) But with us an executor who is *quasi hæres*, may be appointed either *from* or *until* a certain time, and administration granted in the mean time.

(63) Code, b. 30. 22.—45 and 9.

(64) Nov. 115. ch. 5. Our law agrees as to paying funeral expences, and the expence of proving the will, and the like in the first place. The executor or administrator is also allowed to pay himself first among debts of equal degree. In paying creditors the king's debts come first, then debts preferred by statute—then debts of record—next debts by special contract—lastly, debts by simple contract. The or-

The civil law may justly boast a superiority to ours, in attention to natural equity, by considering all assets as what we call equitable, and making no such distinctions as we do at law between simple contract and specialty creditors ; it did, however, make a certain distinction of creditors, but upon a more reasonable discrimination ; it distinguished three orders of creditors, *privileged, mortgagees, ordinary* ; most of the privileged we have mentioned ; such as for rent, law-charges, costs, funeral expences. Of mortgagees we have treated, and the reason of their preference as to their specific lien is evident. So far the *heres* was forced to give a preference. Ordinary came in jointly, and shared in proportion to their debts. See Domat. book 3. tit. 1. sec. 5. Debts of the crown were preferred to simple debts, where no mortgage.

Mention of the Falcidian law, and Falcidian portion perpetually occurs in the writings of the civil law, and demands explanation. The ancestor

der of the civil law is very different, as may be seen above. If there be two judgments against testator, precedency or priority of time is not material ; but he that first sues out execution shall be preferred, and before execution, the executor may satisfy which he pleaseth first. Where no judgment, commencement of a suit gives priority ; but even after the commencement of such suit, the executor or administrator may still give a preference to other creditors of equal degree, by confessing a judgment to them for the real amount of their debts. 1 P. Wms. 295. And even without it, says Dr. Christian, if the suit be in equity, and quotes 3 P. Wms. 401. *surely that authority is e contra.*

was forbidden to disinherit his heir at law even for cause, beyond three-fourths of his possessions: and he could not burthen his instituted heir with legacies which should consume more than three-fourths of the estate; so that, at all events, the heir, whether natural or instituted, was sure of one-fourth of the inheritance, in the former case as his natural right, in the latter as a reward for his labour and trouble (65).

IV. EXECUTORS].—It is usually said, that the executor in our law is the same with the instituted heir of the Roman law: this I conceive to be an error, for they too had their executors in the latter times of the empire perfectly distinct from the instituted heir; and, in fact, created to check and curb him. They took their origin from the frequency of testaments made for pious causes, and to charitable intents, and were appointed in case the heirs were negligent in the execution of wills. The right of inheritance still remained vested in the heir. The executor had only *nudum mi-*

(65) With us executors cannot claim any thing for their trouble or pains, nor trustees, 3 P. Wms. 351. for so the estate might be loaded, and rendered of little value. This sometimes seems a great hardship, though the acceptance of the office is voluntary, and they supposed to act out of mere friendship. Originally executors were undoubtedly supposed to profit considerably by being entitled to the undisposed residuum, but that never was fixed, as it was by the Falcidian law; and they are now with us, if possible, construed to be trustees for the next of kin.

nijsterium facti (66); he was merely to see that the will was properly executed, to him the execution was committed.

Whoever will take the trouble to peruse the 28th section of the third title of the first book of the Code, will, I think, see plainly how the practice originated (67). It begins by charging heirs, devisees, and legatees, not to infringe bequests given, and trusts created for the redemption of captives: it proceeds to say, that if the testator has specially

(66) See Ayliffe, p. 372 and 373. This agrees with the definition of our executor given by Blackstone. The Treatise of Equity very correctly says, the executor is *like* the hæres in the civil law, only he takes nothing to his own use. Book 4. part 2. c. 1. s. 3.

Whether a nude executor can be a witness to prove a will, and whether such an executor, or any executor being sworn, can afterwards renounce, were points strongly controverted in *Herbert v. Russell*, in the prerogative court in Ireland, Michaelmas 1799. The court determined both questions in the negative.

(67) Indeed, it would be extremely worth the pains of any ecclesiastical lawyer, or curious ecclesiastic, to peruse the four first titles of that book, which treat *de summa trinitate—de sacrosanctis ecclesiis—de episcopis & clericis*, and *de episcopali auctoritate*.

The difference between the Roman instituted heir, who always had a right to at least one-fourth of testator's property, and the modern executor, will plainly appear, when the latter is considered, even as to the residuum, as a trustee for the next of kin, yet they are perpetually spoken of as synonymous.

any person to transact the business of such redemption of captives, that person *legati vel fidei commissi exigendi licentiam habeat*; & *pro sua conscientia votum adimpleat testatoris*; it continues, that if no such person be appointed, the bishop of the province shall have the like powers, *votum impleturus testatoris*; and concludes by strictly charging all persons connusant of embezzled charities, to give information thereof to the governor of the province, or the bishop of the diocese. Here then was a person independent of the heir, not interested in the inheritance, commissioned to get possession of the bequeathed property, to execute the will of the deceased, and to administer the property according to his wishes, and from hence by degrees the custom crept in of appointing such executors, and leaving little or nothing for the devisee, or residuary legatee to do, and perhaps leaving to the instituted heir nothing more than the Falcidian portion (68).

In the wide ocean of the civil law we are liable to overlook many things; but I have not observed the name of executor expressly used in the *Corpus Juris Civilis*, before the time of the Emperor Manuel Comnenus, under whom I find a constitution with this express title, *de executoribus testamentorum* (69): it recites, that “multi homines in extremis suis dispositionibus procura-

(68) Ayliffe seems to be of the same opinion, p. 372.

(69) *Constitutiones Imperatoris*, p. 527.

“ *tores fide executores eorum quæ prescripserunt*
 “ relinquant, iis que *Christo* (dulci isto ac salutari
 “ mundo nomine) *herede scripto*, rerum suarum
 “ dispensationem atque administrationem adjun-
 “ gunt;” and that they do this principally when
 they bequeath their property to the poor. Here
 then it appears, that even where the whole admin-
 istration of the property was committed to an
 executor, yet it was thought necessary to name
 an heir; and where they wished not for the possi-
 ble interference of man, that to satisfy the regu-
 lations of the law, the sacred name of our Saviour
 was introduced into the will.

The remaining part of the constitution is in-
 tended to prevent the law's delay upon occasion of
 such favoured and pious bequests, to enforce the
 duty of such executors, and to give powers to the
 præfect of the town, and economist of the church,
 to enforce or execute the intentions of the testa-
 tor, making a due return of their proceedings to
 the imperial court (70). The incapacities of exe-
 cutors were much the same with those of heirs.

V. OF THE INTERPRETATION OF WILLS AND CONSTRUCTION OF LEGACIES].—

Some general maxims of interpretation are too
 deeply rooted in human reason to admit diversity
 in legal science. That the will of the testator

(70) Persons attainted of treason and felony and out-
 lawry, cannot be executors with us. See Wentworth's
Office of Executors, page 17.

ought, if possible, to prevail; that it cannot, however, operate against the rules of law; and that the words ought not to overweigh the manifest intention, are positions universally adopted as just and reasonable: but many cases will occur by no means so obvious, and where wise lawgivers or interpreters may vary in opinion, without imputation on the judgment of any, e. g. Suppose two clauses in a will repugnant to each other, and giving the same things to different persons, which shall stand? In this case, by the civil law, as I conceive, the two hold it jointly or in common (71); and though in ancient times our jurists differed, and would have given it entirely to the later devisee, yet it is very observable that modern determinations have altered the principle, and coincided with the wisdom of the imperial law (72).

It is generally in our courts considered as a maxim, that in cases of doubt, or of doubtful expression, the heir at law is to be favoured; a position which may be carried too far, and which in its unqualified extent has been disputed by eminent men: the civil law, however, left no doubt of its partiality to the heir, of which it gives two remarkable instances in the Pandects, deciding in the one against a double or accumulative legacy; in the other, against the legatees's claim of a larger estate, where a question had arisen, whether a sub-

(71) See Ayliffe, p. 379.

(72) 3 Atkyns, 493. Harg. Co. L. 112/6.

ject of the same name was intended to be bequeathed, and in both cases from declared favour to the heir (73).

Ambiguities were, if possible, to be cured by consideration of circumstances. The fifth title of the thirty-fourth book of the Pandects is *de rebus dubiis*: therein we find the following rule, *cum in testamento ambigue, aut etiam perperam scriptum est, benigne interpretari, & secundum id quod credibile est cogitatum: credendum est* (74).

The intention plainly collected was to prevail over the words, but not otherwise. *Non aliter a significatione verborum recedere oportet, quam cum manifestum est aliud sensisse testatorem.* Dig. 32. 1. 69.

Non ex opinionibus singulorum sed ex communi usu, nomina exaudiri debent, was another rule of interpretation to be found in the 10th title of the 33d lib. of the Digest. The cause and motive of making the will or bequest was also a material consideration (75).

It is truly said, that the interpretation of words in bequests, particularly of personalty, must be

(73) See Pandects, 30. 1. 39. 6. and 31. 1. 47.

(74) So with us general words will often be restricted by the particular occasion, and the circumstances of testator at the time of making the will, and probabilities thence arising will naturally come into consideration.

(75) This index of testator's intention, usually and technically referred to by the name of *causa data non secuta*, is particularly attended to by our law.

fought in the civil and canon laws : it becomes, therefore, of great consequence to the common lawyer, and still more to the equity practitioner, to consult those codes upon the present subject (76). It cannot be expected that an elementary treatise of this kind can afford room for going into detail, over so vast a field : I must refer the reader to a long chapter of Swinburne, part 7. c. 10 (77), and to the doctrines delivered in the fourth book of the Treatise of Equity.

I shall, however, mention the interpretation which some few of those words, which most frequently occur in testaments, bear in the civil law. Of the things which would pass under the name of *goods*, Swinburne, after giving a triple definition of the word itself, has arranged a prolix nomenclature ; even debts and leases would pass, and hence the construction of our law has been the same : this, however, was long a *vexata questio* among the civilians, and does not seem at last

(76) The Treatise of Equity expressly says, in regard that cases of wills of personal estate are for the most part tried in the ecclesiastical courts, and by the rules of the civil and pontifical law, the king's judges must in such cases judge after the law of the church, that there may be a conformity of laws. Treatise of Equity, book 4. c. 1. f. 4. part 1. This the master of the rolls questions in Cray and Willis, 2 P. Wms. 530. and instances the case of a devise over, in case of a child marrying without consent being good in our law, not so by the civil.

(77) I always refer to the edition of 1743.

to have met the approbation of that learned civilian.

Chattels.]—It is observed by Swinburne and others, that chattels is a word more obvious in the laws of this realm than in the civil law; but it seems to be settled that the whole of the testator's personal estate, and consequently his money among the rest, will pass by a general bequest of *all his goods*, or of *all his chattels* (78).

Goods immoveable.]—These words give a right to the leases or leasehold interests which did belong to deceased, and to the natural fruits thereof, as grass growing on the ground, and fruit on the trees, but not to corn growing in the ground, or any industrial fruits, i. e. produced by men's industry: they are counted among the moveables (79).

Moveables.]—Under *moveables* a legatee may recover all personal goods, both quick and dead, which either move themselves, as horses, sheep, and oxen, or can be moved by another, as plate, household stuff, corn in the barn or in the sheaf, and natural fruits if gathered, not *fructus pendentes*, and also corn growing, if it were sown in time, before the expiration of the term, so that testator might have reaped it, if he had lived till harvest (80).

(78) See Swinburne, part 7. sec. 10.

(79) Swinburne, page 503.

(80) Swinburne, part 7. sec. 10. p. 301. *Alimentum*, maintenance, comprehended food, clothing, dwelling, edu-

Upon several of the preceding words there have been considerable contests, as for instance, whether ready money should pass under *chattels*; but of all expressions, *household stuff* seems to have given rise to most contention. The whole tenth title of the 33d book of the Pandects is *de supellectile legata*. And in modern times, though no doubt can be entertained that cattle, carts, vessels affixed to the freehold, and many other things enumerated by Swinburne (81), are not to be reckoned among household stuff, and that apparel and books (82) are excluded by the civil law, yet great contests have arisen, whether plate and coaches, or such like equipages, are to be classed and included under the general name of household stuff. The determinations are, that plate will pass, if considered by testator, not as merely ornamental, but as part of his utensils, i. e. if the testator was in a rank in life which rendered plate an article suitable to his domestic establishments; and Swinburne is of opinion, that coaches and

cation, and even if the situation in life of the legatee demanded it, servants and horses. Dig. 34. 1. *de alimentis legatis*. *Prædium instructum* passed every thing upon it. *Prædium cum instrumento*, only the things necessary for cultivation.

(81) It is remarkable, that upon this subject and several others of a similar kind, the Treatise of Equity has borrowed from and copied Swinburne verbatim, without mentioning the loan.

(82) A library does not pass by this name, 3 Atk. 202.

ornamental carriages are to be numbered among household stuff.

In analysing the interpretation of words in testaments, I have been insensibly carried into the construction of legacies; for, in strictness, it was in them only, and not in the universal devise to the heir or universal successor, that such questions could occur.

Legacies, however, or particular successions, deserve a separate and more minute discussion, both on account of the very special and particular consideration bestowed upon all their various cases by the civil law, and also because its decisions thereupon have generally been followed by the courts and judges of these realms.

The four distinctions of legacies known to the early Romans, and the discriminating lines between legacies direct, and legacies in trust, were all done away by Justinian. The civilians, after discussing the cases of *uncertainty* and *error* in legacies, consider them as *conditional*, *alternative*, *accumulative* or *double* (83), and then proceed to the points of *abatement*, *exemption*, and *translocation*, together with the question when interest shall be allowed upon them (84).

(83) Our law usually divides them into specific and pecuniary, vested and contingent.

(84) On many of these points, as Mr. Woodeson observes, the court of chancery has very unreservedly referred to the rules of the Roman civil law, as principles of de-

Of Uncertainty.]—This may respect the legatee, or the thing bequeathed, and in the first instance may arise from no person being *named*, or from two persons having one and the same name. If no person be named, of course the legacy must be void; and by the earlier Roman law such a description of a legatee as this, I give to *whoever shall give his daughter to my son in marriage*, was too uncertain to make good the legacy. But Justinian amended the law according to reason, and its ultimate regulation was, that legacies might be given to uncertain persons, if the testator's meaning could be found out, or they rendered certain by the event (85).

If there were divers persons of the same name, the legacy was void for uncertainty, unless one of them was able to prove himself the person intended, of which his being the intimate friend or near relation of the deceased was allowed to be strong proof. But charitable legacies were not to fail from the want of certainty as to the object intended. If to a church without naming any one in particular, it would be interpreted the parish church of the deceased; if to the poor, the poor of his parish; but at all events, the

cision; and the same author, in another place, truly says, in all testamentary matters of a personal nature, our courts have availed themselves of the wisdom and experience of the civilians.

(85) See Inst. lib. 2. tit. 20. sec. 25. et deinceps.

pious astuteness of the law would prevent the failure of his good intentions (86).

Uncertainty as to the thing bequeathed must most usually proceed, from the bequest being too general and not sufficiently definite, and even neglect to express the quantity was fatal by the civil law; but Swinburne observes, that the equity of our ecclesiastical law admits such legacies, leaving the quantity to the discretion of the ordinary.

This uncertainty must frequently produce a question of *option* or *election*. E. G. if the testator bequeathed a horse, having many, who should chuse? the election belonged to the heir if the words were directed to him, as I will that my heir shall give A. B. a horse; to the legatee, if directed to him, as I will that A. B. shall have a horse, but in the former case the heir must not chuse the very worst, nor in the latter the legatee elect the very best (87).

(86) So with us in gifts to charitable uses, if no specific description of object be pointed out, the court of chancery will, in respect of the general purpose appearing, direct the mode of giving it effect. *Attorney General v. Henrick, Ambler, 712.* collateral proof may be admitted to make certain the person or thing described. See *Treatise of Equity*, book 6. ch. 2. sect. 6. and the cases there cited. Covenant designed for the benefit of the church, if possible to be specifically performed, 2 Eq. Ca. Ab. 17.

(87) He who ought to do the first act shall have the election, by our law. Co. L. 145. a.

Error.] This may be in the person, in the name, or the quality of the devisee or legatee. If it could be proved that the testator meant one person, but by mistake mentioned another, the legacy to the latter was void, but a wrong description would not vitiate, if the person could be ascertained (88). The same rule held as to a mistake in the name. An error in the quality was not hurtful, unless that quality were the final cause, wherefore the testator gave the legacy (89). An error in the proper name of the thing did not vitiate, but in the name appellative of it did, for that was in the substance.

Conditional Legacies.] If the legacy was pure and simple it became due the day of the death of the testator, and therefore if the legatee died first, it lapsed and was not transmissible; but if the legacy was conditional it became due the day on which the condition was performed, and lapsed if the legatee died before that day. These were the general rules (90), but there were

If a man grant one of the horses in his stable, the grantee has his election to take which he pleases. Co. L. 745. a.

(88) See 2 Inst. lib. 2. tit. 20. sect. 30. *De falsa demonstratione*, ibid sect. 29. *De errore in nomine legatarii*. Legacy to the two daughters of A. A. has three daughters, they shall all take. *Stebbing v. Walker*, 2 Brown, p. 85. To James second son of A. he was the third, the name prevails over the order.

(89) Ibid. sect. 31. *De falsa causa adjecta*.

(90) So they are in our law, but as to the first a bequest may be so worded as to prevent lapse, 3 Atkyns, 372. 380.

many exceptions and distinctions, among which none is better known to our law than that between time annexed to the substance and to the payment of the legacy; in the former it did lapse, e. g. if the words were *when or if* A. B. shall arrive at twenty-one, (91) in the latter was transmitted to representatives of legatee, e. g. if they were *to be paid* when A. B. shall be of the age of twenty-one.

The law distinguished between a *conditional* and a *modal* legacy, i. e. one in which the mode or manner of applying the legacy was mentioned, as so much to bind a boy apprentice, or to erect a monument; in these cases the legacy was vested and due immediately, and did not lapse by the death of the legatee, and our law agrees. *Barlow v. Grant*, 1 Vernon, 255. See *Swinburne*, p. 253.

Under conditional legacies we must again advert to those conditioned in restraint of marriage. I have before said, that by the civil law all conditions in restraint of marriage were void, as contrary to nature, and hurtful to the community, and marked the diversity between that

and as to the latter, there are many cases in which it is *debitum in presenti*, though *solvendum in futuro*, vested and transmissible. See them collected 2 Fonbl. p. 374.

(91) Lands devised in this manner will descend to the heir, 3 Term R. 41. All that the civil law has said upon the subject is applicable to what we call real, as well as to personal estate. An estate to A. and his heirs, if A. dies before testator, the devise is void, as appears from every case

and our system on the subject (92). I must be understood to mean, however, prohibitions of marriage altogether, for if it was only in part restrained, in respect of time, place, or person, the civil law agreed with ours, for this was only protecting the individual from the consequences of hasty, rash, and improvident matches.

Under the head of lapsed legacies, I must also again observe, (93) that there was no survivorship among legatees by the civil law, but that ours differs in that respect (94).

. *Alternative Legacies.*]—In this case there was but one legacy, as if the testator bequeathed his estate at Tivoli, *or* his estate at Brundisium, the

from Brett and Rigden in Plowden, to White and White, a case from Ireland, not many years since determined by the Lords in England, where the testator's intentions in favour of his grandson by his eldest son deceased, were forced to bend to the rules of law which gave the property to his second son.

(92) Book 1. Chap. 1. p. 79. and Introductory Chapters, p. 31. Unreasonable conditions in legacies were null, as to be decollated or consumed in lime from fear of inhumation alive, were deemed such. But was it not too great a latitude to annul conditions tending to quiet the departing soul, and founded in apprehensions proved by experience, to be not altogether groundless?

(93) See note to p. 212. in the chapter on Joint-tenancy.

(94) As appears from the case of Northey and Burbage, Gilb. Rep. 137. and Buffar v. Bradford. 2 Atks. 210.

legatee should have but one of these estates, but he had his option which he would take; if property was given to A. or B. they took jointly.

Accumulative Legacies.]—They might be either accumulated upon another legacy, upon a child's portion, or upon a debt due. In the first case if they were pecuniary, and given by the same will, the presumption was against the legatee, but if the two pecuniary bequests were in different writings, as e. g. in a will and a codicil, whether the latter was more or less, or equal to the former, it was to be construed accumulatively, the presumption was in favour of the legatee (95); but if it was a specific thing, a *corpus* as the civil law terms it, it could not be devised twice, the legacies were not held to be accumulative, for *eadem quantitas sepius præstari possêt, non vero eadem res*. But these rules being only applied to, where there was no internal evidence of the intention, of course yielded to that intention if it appeared manifest (96).

(95) *Cæteris paribus, a testator must be supposed to mean a benevolence.*

(96) See particularly Dig. 34. 4. 9. and also Dig. 22. tit. 3. de probationibus & presumptionibus, and Swinburne, L. 50. these rules have been most clearly illustrated by Mr. Justice Aston, and the Lord Chancellor, in Hooly and Hatton, and by Lord Thurlow, in *Ridges v. Morrifon*, 1 Brown, 389. who all evince their knowledge of the Roman law, and whose example ought to be the strongest incitement to its study.

As to double portions, the general tenor of cases, (and upon this subject the principles of the civil law cannot be better illustrated than by the decisions of our courts of equity,) seems to have been to lean against them, *i. e.* that a legacy should be construed to be a satisfaction, unless there are circumstances to shew that it was not so intended. To this, however, there are numerous exceptions, as when the provision by the will is inferior, and whether there can be any general rule, was vehemently disputed in the case of *Hanbury and Hanbury*, 2 Brown's Rep. p. 352. where all the cases on the subject are collected, and in which an eminent advocate declares he could find but two cases, and those governed by very special circumstances, where a legacy was not construed to be a satisfaction of a previous portion.

Where a father makes a provision for a child by his will, and afterwards gives to such child

A larger legacy given to the same legatee in a will after a less, legatee shall take both. *Curry v. Phill*, 2 Brown, 225. so that the rule of the civil law seems only to have been followed where the legacies in the same writing were equal in quantity; in *Coote against Coote*, 2 Brown, 526, a second codicil appearing to be only a repetition of the former, with the addition of a simple legacy, the legacies were not doubled; but the most remarkable point in that case was, that parol evidence was read, to shew they were not intended as accumulative. See p. 525. 2 Brown, for the reasons given.

a portion in marriage, or for establishment in life, of equal or greater amount than the legacy, it is an implied ademption of the legacy (97).

I proceed now to the third case, viz. of a legacy bequeathed to a creditor by his debtor. The presumption here *prima facie* was, that the legacy was to go in satisfaction of the debt, for that the testator must be supposed to be just before he is kind, and the maxim of the civil law was *debitor non presumitur donare*. But this presumption was carried too far, and if the legacy be less than the debt, or on condition, or on a contingency, or not equally beneficial with the debt in any particular, it has not been construed to go in satisfaction, but accumulatively. So if the thing were of a different nature, thus land was not to go in satisfaction of money (98).

(97) See the exceptions to this rule collected by Mr. Fonbl. 2 vol. p. 554. How far a wife shall have both a legacy and a provision, covenanted at the time of marriage, see *Babbington v. Greenwood*, 1 P. Wms. 531. *Eastwood and Vinke*, 2 P. Wms. *Richardson v. Elphinstone*, 2 Vesey, jun.

(98) Inst. 2 Lib. These principles are found among other places of the second book of the Institutes, lib. 20. sect. 14. which is *de debito legato creditori*. Though our courts of equity have followed them, yet where the testator has left wherewithal, and shewed his intentions so to be, he has been construed to be both just and bountiful. See *Salk. 155. Cuthbert v. Peacock*, and *Chancey's case*, 1 P. Wms. 408.

The points of abatement and interest may be very briefly discussed; as to the first, the heir, whenever he paid legacies, might demand caution from the legatees that they would refund, if there were a deficiency of assets (99), Ayliffe, p. 377, but charitable bequests were not to abate in proportion with the rest, Nov. 131. ch. 12. and as to interest, the rule is thus briefly laid down in the Pandects, 30. 1. 23. *si quis bonorum partem legaverit sine fructibus restituitur, nisi mora intercesserit hæredis*. The heir was not accountable for the fruits, unless he had been in delay, if, for instance, he refused to pay because they objected

A legacy cannot be counted a satisfaction of a debt contracted after the will made, 1 P. Wms. 299.

So if the debt was upon an open or running account, *ibid*.

Legacies naturally imply a bounty, and therefore in *Clark v. Sewell*, 3 Atks. 97. the maxim, *debitor non præsumitur donare*, would not hold, said Lord Hardwicke, if it were now to be reconsidered.

The courts of late have not altogether disavowed this doctrine of satisfaction, yet they have been very inclinable to lay hold of any circumstances to distinguish the latter from the former cases. 2 Vesey, 636.

Any minute circumstance is laid hold of to evade the rule of a legacy larger or equal to a debt, being a constructive satisfaction.

(99) With us pecuniary legatees abate in proportion, but not specific legatees. Charitable legacies abate equally with others.

to his retaining the Falcidian portion, he paid not interest, for the delay was not his (100).

Ademption.]—This might arise from the destruction of the thing bequeathed, from calling it in if it was a debt due to the testator, or from the improper conduct of the legatee. If the thing bequeathed perished before delivery without the fault of the heir, the loss fell upon the legatee (101); so if it be changed, as if the testator pulled down the house bequeathed, and built another, the bequest did not extend to the new edifice (102). If the testator in his life-time alienated, or gave the thing to another, the legacy was extinguished of course (103); but if the alienation was not voluntary, but constrained by temporary poverty, or some such causes, many civilians have insisted, that either the legacy was not extinguished, or at least the proof of altered intention was thrown on the heir (104).

(100) If a legacy be charged on land, and no time of payment mentioned in the will, it carries interest from testator's death; so if upon productive personal estate as out of mortgages, or stock yielding interest or profit; *causa patet*. But if it be to come generally out of the personal estate, and no time of payment mentioned, it shall carry interest only from the end of the year after the testator's death.

(101) Inst. lib. 2. tit. 20. sec. 16. *de interitu & mutatione rei legatae*.

(102) Dig. 30. b. 5. sec. 2.

(103) Dig. 34. 4. 18.

(104) Dig. 32. 11. 12.

The calling in a debt due, was considered as an ademption, the receiving it as voluntary payment not so (105); yet even the former rule is by no means satisfactory, as he might have called it in, merely from apprehension of the security (106), and ademption of legacies is not to be presumed.

Other causes of ademption were peculiar to the Roman law, as if the legatee had grievously injured or wounded the testator, or great enmities had subsisted between them; rules opening a license for controversy and difficulties in proof and practice, wisely avoided by our law, for who should determine the gradations of ill-will which should or should not be construed to extinguish the legacy (107)?

Before I quit the subject of legacies, I must remind the reader of what was said in the Chapters on Jointenancy, that by the civil law there

(105) Dig. 32. 11. 13.

(106) That distinction has been exploded with us, but another is made between a specific legacy and one *in numeratis*, viz. that the former is lost by being altered, not the latter. See Treatise of Equity, book 4. part 1. c. 2. f. 2. and the cases mentioned in the note.

(107) Pandects, lib. 34. tit. 3. f. 11. *Si quidem capitales vel gravissimæ inimiciæ intercesserint, ademptum videtur quod relictum est; sin autem levis offensæ, manet fidei commissum.* I must here observe, that simple legacies, and legacies or bequests in trust, are generally considered together in the Digests. The 30, 31, and 32 books of the Digests are entitled, also the 1, 2, and 3, *de legatis & fidei commissis*, and treat entirely of them.

was no survivorship among legatees, a rule followed by our ecclesiastical courts, and strongly urged in the court of chancery, but by the latter tribunal repelled (108).

After legacies, the Institutes treat of trusts and substitutions; the latter have been explained in the chapter of Remainders, and what is said on the former seems little interesting to the modern advocate. These chapters of the Institutes treat principally of laying equal burthens on the heir, and the person for whom he held in trust, when such a trust was created, because originally the heir felt the whole burthen in such cases without any benefit, and thereby the legatee, or cestuyque trust (if we may call him so) suffered, because the heir would not accept the inheritance, and thereby the legacy or trust sunk also. To remedy this, provisions were made, that if the heir was a mere instrument of transfer to the cestuyque trust, and derived no benefit, he should not be subject to debts, or feel any burthen: or

(108) Webster and Webster, and Cary and Willis, 2 P. Wms. are cases in which it was controverted, whether a legacy being given to several persons, they should be joint-tenants, according to the rule of the common law, or tenants in common, according to the rule of the civil, and that of the ecclesiastical courts, which admit of no survivorship; determined in favour of jointtenancy, and in the latter case, as I have before observed, the master of the rolls says, that he does not see that a court of equity should, even in case of a legacy, judge according to the rules of the civil law.

at least as he retained his Falcidian portion against the cestuyque trust, as well as against legatees, that the debts should be divided proportionably between them (109).

VI. HOW WILLS MIGHT BE AVOIDED.]

—They might be rendered null and void by *cancellation—express revocation—a later testament—implication—inofficiousness—imperfection*, or by shewing that they were unduly *obtained*, to which we must add *adoption*, and the *capitis diminutio*. *Cancellation* or obliteration deliberately done must be allowed sufficient to avoid a will, but as it might happen by accident, and is *prima facie* an ambiguous act, in order to make it a revocation, it should be shewn if possible *quo animo* it was cancelled; and if there be a controversy, who did it, it will be presumed to be done by him in whose custody it was (110). *Quæ in testamento legi possunt, ea inconsulto deleta,*

(109) It must be observed, that though the *fidei commissa* of the Romans are perpetually compared to our trusts, the resemblance is very remote. The heir took the estate on trust to hand it over to another, the latter then had an inchoate right or claim, but no actual estate; those were not two contemporaneous estates, one legal and the other equitable, one in the trustee, the other in the cestuyq. trust. The *fidei commissary*, therefore, though called cestuyq. trust, as a sound familiar to our ears, is not called so in our sense of the words, nor can we learn much from their doctrine of trusts.

(110) One of the most remarkable cases upon cancellation in modern times is reported in Cowper, p. 49.

nihilominus valent ; consulto, non valent, say the Pandects, 28. 4. 1.

Express revocations either of legacies or of privileged testaments might, by the civil law, be simple, naked, or even verbal. Thus, testaments *ad pias causas*, and military testaments might be revoked, but solemn testaments were to be solemnly revoked (111). Wood says generally, that verbal revocations were not valid, but his authority, viz. Inst. 2. 17. 7. does not support him, relating only to the emperor.

Burtenshaw v. Gilbert, in which, among other points, it was determined that the act of cancelling a latter will doth not set up a duplicate of the former, and that where there are duplicates of a will, one in the testator's custody, the other not, and the testator cancels that which is in his custody, it is an effectual cancelling of both.

(111) See Swinburne, p. 531. The statute of frauds enacts, that no demise in writing of *lands, tenements, or hereditaments*, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same; or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent; but all demises and bequests of lands and tenements shall remain and continue in force, until the same be burnt, cancelled, torn, or obliterated by the testator, or by his direction in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the deviser, signed in the presence of three or four witnesses declaring the same. Sec. 6.

And no will in writing *concerning any goods or chattles or personal estate* shall be repealed, nor shall any clause,

Later testaments to revoke those antecedent, must be perfect in every respect. *Tabulæ priores jure factæ, non irritæ fiunt*, say the Institutes, 2 book, title 17. f. 7. *Nisi sequentes jure ordinatæ perfectæ fuerint*. See also Code, b. 23. 21. 3. Nor was the instance given in the same title of a second testament invalid by the non-acceptance of the heir, revoking a former and occasioning the *pater familias* to die intestate, sec. 2. an exception to the rule, because there the second testament was perfect in itself, though rendered invalid by matter ex post facto (112).

devise or bequest therein be altered or changed, by any words, or by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof, read unto the testator and allowed by him, and proved so to be done by three witnesses at the least.

(112) Our law agrees. See Onions and Tryer, 1 P. Wms. 343. But a difference of solemnities is prescribed where a will is to operate substantively, and where it is merely to revoke a former.

It is said also, that it must be a subsisting will at testator's death, 4 Burr. 2512. unless the second will expressly revoke the first, which was the case of Burtenshaw and Gilbert, mentioned before. The republication of a will once reversed with us must be attended with the same solemnities as the original making.

The statute of frauds does not extend to implied revocations, and it is agreed, that an alteration of circumstances may operate as a revocation of a will of lands, as well as of personal estate. See 1 Abr. Cas. Eq. 413. Where the whole estate is disposed of, subsequent marriage and the birth of a child form a presumptive revocation, liable how-

Implied revocations were familiar to the Roman law, thus the birth of children operated as a revocation of a precedent will. See Inst. 2 lib. tit. 13. sec. 1.

Imperfect testaments might be so in respect of solemnity, or respect of will. Of the former we have treated (113). Imperfection in respect

ever to be rebutted by evidence. See Brady and Cubit, Douglas p. 31. Lord Northington and Dr. Hay were of opinion, that marriage singly would not revoke a will of *personality*, for in real estate the question does not occur. Mr. Fonblanque has advanced a contrary opinion, admitting, however, that the presumption is liable to be encountered by every circumstance indicative of a contrary intention. Treat. of Eq. 2 vol. page 360. In a very strong case marriage was held to be a revocation of the will of a woman. Hodsden and Lloyd. 2 Brown's Ch. 534.

Another great point in dispute has been, whether the birth of a child simply, shall operate as a revocation. Dr. Hay, in the remarkable case of Shepherd and Shepherd, held it did not, and the Roman rule being referred to, and it being insisted that the Roman law in general guides the decrees of the ecclesiastical courts, (he answers) no further than it stands uncontradicted by the English. But Mr. Fonblanque insists, that it is not so contradicted, and that our rule is the same; and in answer to the observation, that children are not with us considered as having a property in the effects of their father as they were at Rome, replies, though not an indefeasible property or legal right to any part, yet they have a natural and moral claim.

(113) No want of solemnities affects a will of personal estate with us. The most ragged and dirty papers, I may say fragments, in testator's hand writing, or even dictated,

to will might be either when the testator was prevented from finishing his testament by death or other impediment, or having voluntarily deferred its completion, death intervenes, and there is no question that by the civil law it was void in such cases, even as to the part already done (114), though it were the testament even of the father among his children (115).

The rigour of the civil law adopted the same rule, where the testator himself deferred the finishing his testament and died, or was otherwise prevented from giving it perfection.

But if the testator having declared his whole will for the present, reserved something to be done at another time, and in the mean time died (116), the testament was perfect notwithstanding.

and not regularly witnessed, where no suspicion of fraud, and they could be put together so as to collect the sense, and there appeared no imperfection of will, have been established as testamentary dispositions, at least so far as to be directions to the administrator who was obliged to act with them, as *cum testamento annexo*.

(114) Swinburne makes a great question, whether it be void *jure gentium*, and therefore by the law which we use in England; and makes that depend on another question, viz. whether a testament *ad pias causas*, which is also governed *jure gentium*, be in such cases void or not, as to what is already done, and is of opinion that it is not.

(115) Swinburne, part 7. p. 519.

(116) Swinburne, *ibid.* And Swinburne insists, that in both cases our law establishes what has been done; it

Astowills unduly obtained. The variety of fraud and influence which might be used for this purpose is not reducible to limitation or description, and is on every account the subject of pictures too melancholy to arrest the disgusted eye, longer than they force themselves upon it. It is one of the great themes of the Roman satirists, and too often the subject of horror in the countries in which we dwell (117).

must be understood as to personalty since the statute of frauds, and that the clauses in the part done are perfect. But if the testator declares that he means to make alterations in the part already made, and dies without making them, the will, though of personalty, ought not to be established, for no man can tell where he meant to alter, and it is not his will.

If a paper writing of a testamentary nature *as to personalty* be found, whether it shall be a draught only or a testament, must depend on a variety of circumstances, for which I must refer the reader to Swinburne, part 7. sec. 13.

The 22d and 23d title of the 6th book of the *Code de testamentis*, should be diligently perused by the student.

(117) The limits of undue influence, and the lines between it and laudable attention, are too nice for general rules, and in every case must depend upon its circumstances. Some cases are too strongly marked to admit of doubt, as where the bounty of the testator has been diverted by gross misrepresentation, or his relenting mind not suffered to feel the whole determining effect of the supplications of a child. But the positions of Swinburne, as to flattery and importunity, if admitted to be law in the wide extent laid down by him, would make wild work indeed. In general, in such cases, as I have been told by learned civilians in

Inofficious Wills.]—It is now generally known that by the civil law, a will was void, if children in *the power of the father*, were therein passed over in silence or disinherited without cause; and that a silly' and false opinion has prevailed among the ignorant, that our law had adopted the rule; which gave rise to the custom of leaving a shilling to a disinherited child. The civil law had its peculiar reasons, which I have often mentioned, viz. that the child *was considered as one and the same person with the father, as having a property in his effects, and therefore prima facie entitled to continue the management of his own estate.* But if he was mentioned in the will, and the cause expressed, he might be disinherited, provided it was one of the causes allowed by the law. Among these were striking or cursing, killing or endeavouring to kill the parents, accusing them of capital crimes, and even refusing to be security for them. Heresy in the son was a sufficient cause—nay, his disgracing himself, as by going on the stage, with many others to be judged of by the magistrate; but the privileged will of a soldier could not be inofficious.

Adoption and change of state.]—A will at Rome was also void; if the testator suffered a diminution of his liberty, or of the rights of the city by way of punishment, or was condemned to death (118); England, the disposition of their courts, is *ceteris paribus*, to lean in favour of the will.

(118) Dig. 28. 1. 8. 1. For the three kinds of *capitis diminutio*, see book 1. p. 35. above.

and also by the agnation of an heir, when a person had by arrogation adopted a son (119). These provisions, peculiar to the Roman law, do not merit to be dwelt upon by us.

VII. PROBATE OF WILLS.]—The publication or probate of the will, was to be made before a competent judge, and at Rome this judge was the *Magister census*. The bishops endeavoured to intermeddle with this power, founding their claims, on their being the legal overseers (as they were) of the administration and fulfilling of pious and charitable bequests. Justinian interfered and forbade ecclesiastical jurisdictions to meddle with testamentary causes. In later times of the empire, however, they appear to have claimed this authority with success (120).

The mode of authentication was by inrolling it in a public registry (121), (after it had been opened in a solemn manner), resembling our prac-

(119) Inst. 2. 17. 1.

(120) That the county courts formerly had jurisdiction of wills,—the separation of the bishops and sheriffs courts in the reign of William the Conqueror,—and the spiritual courts gradually drawing to themselves the cognizance of wills, (until in the reign of Henry II. they appear to have got it exclusively) are historical facts, universally known to men of the legal profession.

(121) *Testamenta omnia ceteraque quæ apud officium censuale publicari solent, in eodem loco referuntur, nec unquam permittatur fieri ulla translatio.* Code 6. tit. 23. sec. 18.

tice of enrolling deeds in a court of record (122), and then, though the original was lost, credit was given to the registered copy (123); thus the Code 6. book 23. title *de testamentis*, sec. 2. says, *Publicati semel testamenti, in qua primum a testatore scriptum reliquum fuit casu qui probatur intercidit; nihilominus valet.*

VIII. BONORUM POSSESSIO.]—The four first titles of the thirty-seventh book of the

(122) Probate with us is in common form, by taking an oath, where no question is raised upon the will, and this should not be administered till fourteen days after testator's decease, to give time for objection, if there be any, or if a caveat be entered.

Probate in special form is by examining the witnesses to the will, or other sufficient proof, where opposition is given to its establishment.

(123) With us, as every person knows, the original is deposited: the probate or authenticated copy with the seal and authority of the court is given out. And though the probate is of no avail as to real estate, yet as wills for the most part consist of mixed bequests and devises of real and personal estate, they are generally proved in the spiritual courts.

I cannot but lament here, a circumstance I believe not generally known, that the great depository of wills in this kingdom, those most important muniments of property, is at present in no manner protected from fire, but on the contrary in a most remarkable manner exposed to it; from the construction of the building, and nature of its vicinity, a circumstance by none more lamented than the conservator of them: it ought to be an isolated and specially constructed edifice.

Digests or Pandects treat *de bonorum possessionibus* (124). This possession of the goods was

(124) It has been often said that the administration, granted by the ordinary, is not unlike the *bonorum possessio* granted by the Roman prætor, which leads me here to speak of administration. I am not called upon in chapters upon civil law to go deeply into the doctrines of modern administration, they being generally well known.

I shall, however, here briefly note who are entitled to administration, with the different kinds of administrators, and observe on the different effects of probate and administration as to suits, and as to transmission of rights.

Who are entitled to administration.—I. The ordinary is compellable by statute 28 H. VIII. ch. 18. in Ireland, to grant administration of the goods and chattles of the wife to the husband, or his representatives, and if he survives the wife, to his next of kin—and of the husband's estate to the widow or next of kin, either or both at his discretion.

N. B. Joint administrations are not favoured, as productive of contention, and *cæteris paribus*, the widow is usually preferred.

II. Among the kindred, those that are nearest in degree to intestate are to be preferred, reckoning according to the computation of the civilians, children, parents, brothers, grandfathers, uncles or nephews, and the females of each class respectively, lastly cousins, and of persons in equal degree, the ordinary may take which he pleases.

III. Half blood is admitted as well as the whole; thus a brother of the half blood excludes an uncle of the whole—and administration may be granted to sister of the half, or brother of the whole, at ordinary's discretion.

given by the prætorian authority from justice, where those who had equitable claims, could

IV. If the kindred refuse, it may be granted to a principal creditor.

V. If an executor refuses or dies intestate, administration may be granted to a residuary legatee.

VI. In defect of all these, ordinary may chuse any discreet person. If administration be granted contrary to the statute, it is not void, but voidable. 1 P. Wms. 43. If administration be granted to the next of kin, the ordinary cannot revoke it without cause, and he may be compelled by mandamus to grant it to the person entitled. Comyns. Admn. b. 7.

Different kinds of administration.—Besides the general administrator hitherto described, administration may be granted for special purposes, or for limited times, as *pendente lite*, *durante minore ætate*, *durante absentia*.

To substantiate a suit in equity, and make a decree perfect by having a personal representative before the court, it is often necessary to apply to the ecclesiastical court to grant administration to the nominee of the party, which was usually granted only for that special purpose. Much mischief having arisen from such partial administrations, the court of prerogative now, in compliance with the wishes of the court of chancery, (which indeed refused to attend to such administrations), insists on such nominee taking administration generally.

The other species of administrations explain themselves, and are grantable to any proper person at the discretion of the ordinary, they not being within the statute. For the powers of these administrators, see Walker and Woollaston, 2 P. Wms. 576.

Different effects of probate and administration, and of administration granted wrongfully or by mistake.—Executor

not support their title at law; or from necessity, where the persons legally entitled refused to act. Emancipated sons, and heirs disinherited by inofficious wills, afforded instances of the former, and the want of a will, or its concealment, frequently gave occasion to the latter; the grant might be *decretal* and temporary, till it was known who had the real right of possession, like that to an *administrator pen. lit*; or it might be *edictal*, when there was no occasion to hear parties judicially: the latter again might be *secundum tabulas*, where the heir instituted by strictness of law could not act, (like an administra-

may grant, and release, and commence an action or suit in equity before probate, but not maintain one. Administrator cannot commence an action before administration granted; executor may also release or pay a debt, assent to a legacy, and be sued before probate. See Wentworth's Office of Executor, and Comyns's Dig. Adm. b. 9.

The executor being appointed in special confidence, transmits his power to his executor, who however takes out letters of administration to the first testator, being entitled so to do; but the administrator of the deceased, being merely the officer of the ordinary, and the administrator of the deceased's executor having no privity with deceased, do not transmit their rights, and in such cases the appointment naturally devolves to the ecclesiastical court, who appoint a new administrator *de bonis non*.

Administration granted, if will afterwards appears, all acts done by the administrator are void, for administrator was not the representative of deceased: but if administration be granted to a wrong person, and afterwards repealed, all acts done by the first administrator are good.

tion *cum testamento annero*), or *contra tabulas*, i. e. in contradiction to an inofficious will, which had disinherited children without cause.

IX. COLLATIO BONORUM.] Where the goods were granted *contra tabulas*, if the person thus admitted by prætorian equity, had already received some preferment or provision, from the deceased, he was not to be admitted (125) into an equal division, until he made an allowance for that part which he had received from testator while living. There was to be a general contribution, or collation of the goods, and the same rule held also in cases of intestacy (126).

(125) If one of several daughters has had an estate given with her in *frankmarriage* by her ancestor, (*i. e.* a species of estate tail, given by a relation for her advancement in marriage,) if lands descend from the same ancestor to her sisters in fee simple, she or her heirs, shall have no share of them, until they bring the lands given in *frankmarriage* into hotchpot.

As to personal estate, the statute of distributions in Ireland, 7 W. III. ch. 6. in its third section, ordains that no child of an intestate, except his heir at law, shall have a distributive share, if he has already received an advancement or money, equal to the distributive shares of the other children; and if the advancement be not equivalent, such child shall only receive so much as will make them all equal.

(126) To enter more into detail on executorships and administrations,—payment of debts, marshalling of assets, &c. &c. would be to comment not on the Roman laws, but ours, which latter I never meant to introduce except where points of comparison occurred. I therefore *verbum nil*

In all cases therefore whatsoever, the person previously advanced was obliged to a contribution, or *collatio*, before he could share.

amplius addam, except to make the following miscellaneous observations, that all assets being by the civil law equitable, and no distinction of real estates, from personal, it had no occasion for any method similar to that so celebrated among us, of making all the assets equitable, and all creditors come in *pari passu*, by devising real estates for payment of debts. That the general rule of the civil law, that none could die partly testate, partly intestate, which is unknown to us, was sometimes relaxed among them, even in cases of unprivileged persons, viz. by matter *ex post facto*, as if a son succeeded in an action for an inofficious will against one heir, and failed against another. See Dig. 5. 2. 15. That an administration obtained in a foreign country, as at Paris, is not taken notice of in our courts, 3 P. Wms. 371. That in Holland, a testament is valid without any distinction between moveable and immoveable estate, or between chattles and lands, if made before seven witnesses, according to the Roman solemnities, but it was generally made there before two echevins and a secretary, or before a notary and two witnesses, men not women. See Corvin. Enchiridion. Lib. 2. tit. 11. and that in France, formerly (for who can now pretend to say what the ever varying laws of that country may be at a given moment?) as well as in Spain and the Empire, testaments made before a notary and two witnesses were good and valid, though the testator and witnesses neither sealed nor subscribed, according to *Groenweg. de Legibus Abrogatis*, a work whose subject is most curious and interesting; but which I am forced to quote at second hand, not having been able to get it in this kingdom.

CHAPTER XI,

OF TITLE BY CONTRACT.

SIR William Blackstone says, that amongst us almost all the rights of personal property in a great measure depend upon contracts of one kind or other, or at least may be reduced under some of them: he at the same time observes, that it is the method taken by the civil law, which (says he) has referred the greatest part of the duties and rights of which it treats, to the head of obligations *ex contractu*, and *quasi ex contractu* (1).

My anxiety to render the civil law familiar to the common lawyer, has induced me to depart from this method of the civilians, and to anticipate some of the subjects which Justinian considered under the head of contracts, particularly leases and mortgages, which I shall here again however notice, in their proper place (to speak as a civilian), among contracts, in the

(1) 2 Black. Comm. 442.

light in which they are viewed by the Roman jurists.

Obligations, agreements, contracts, and covenants, are often used as synonymous words (2), and where they are distinguished, the distinctions are not uniformly agreed to, nor accurately observed. Perhaps the most useful distinction is, that contract is distinguished from obligation by being applied to (3) two persons, whereas obligation may apply to one only; and from covenant, as it relates to a thing present, covenant to a thing future (4). Yet Mr. Wood says, that a contract may affect one person only, and instances *mutuum* and *stipulation* as contracts where one party only is under an obligation, and where an action lies but on one side; and Mr. Woodeson asks, why may not a covenant relate to the past and the present, as well as the future (5)?

(2) Bacon's Abr. 526.

(3) A contract is an agreement,—a mutual convention or bargain—there must be two *contracting* parties, 2 Blac. Comm. 442. the particle *con* in the composition implies it.

(4) The debtor is obliged, not to the creditor; *present* file is a contract, an agreement that a man *will* pay rent is a covenant. Blackstone distinguishes contracts into *executed*, and *executory*, the former differing nothing from grants, and distinguished from mere gifts, by being upon consideration.

(5) Wood, p. 165. Woodeson, Lect. 45. vol. 3. p. 85. Wood is not consistent, for he makes covenant to differ from obligation, as always affecting two persons, and makes contract a species of subdivision of covenant, viz. that in which

. This nicety of distinction, however, not seeming to be absolutely necessary in the common course of life, I shall proceed, without further insisting on it, to delineate the order of the Roman law upon the subject of obligations and contracts, which is most remarkably clear and methodical (6).

Obligation, says the Roman lawgiver, is *juris vinculum quo necessitate adstringimur alicujus rei solvendæ secundum nostræ civitatis jura*. The word *solvendæ* narrows the definition too much, and therefore legal writers interpret the necessity in general terms, *that of giving or doing something* (7).

Obligations were divided into natural, civil or mixed, and sometimes into civil and *prætorian*.

Obligations might arise from a lawful or unlawful act, in reality or by fiction of law, and therefore were of four species.

Ex Contractu.

Quasi ex Contractu.

Ex Delicto.

Quasi ex Delicto.

FIRST, OF OBLIGATIONS, EX CONTRACTU.

Contracts were either nominate or innomi-

there is a consideration, yet afterwards says, contracts may affect one only.

(6) No man can read the classification of contracts in Justinian's Institutes, without admiring the perspicuous and beautiful arrangement.

(7) Otherwise innominate contracts would be excluded.

nate (8). Nominate contracts were such as had particular forms of actions assigned to them (9), from their frequency and general intelligibility.

They were Ex re—Ex verbis—Ex literis—Ex consensu.

Real. Verbal. Literal. Consensual.

Those Ex re,

were subdivided.

<i>into</i> Mutuum,	<i>Loan for consumption.</i>
Commodatum,	<i>Loan for use.</i>
Depositum,	<i>Deposit.</i>
Pignus,	<i>Pledge.</i>

Ex verbis,

<i>into</i> Stipulationes,	<i>Stipulations.</i>
Fidejussoriz cautiones,	<i>Sureties.</i>

Ex literis,

admitted no subdivision.

Ex consensu.

Emptio & venditio,	<i>Sale.</i>
Locatio & conductio,	<i>Hire.</i>
Societas,	<i>Partnership.</i>
Mandatum,	<i>Commission.</i>

Innominate contracts, called also pacts, were such as being more rare, and not of the same defined and certain nature, the law had not provided any express or peculiar form of action to enforce, but had left them open to such suit as was best adapted to the occasion, which was called an action in *prescribed terms*, and seems to

(8) There was another division of contracts into *bonæ fidei* & *stricti juris*.

(9) See *Powel on Contracts*, 1 vol. p. 335.

have been analogous to our action on the case, as distinguished from an action of debt, *detinue*, &c. &c. (10).

Innominate contracts were usually ranked under four classes, expressive of the consideration on which they were founded, and which was never pecuniary. 1 *Do ut des*. 2 *Do ut facias*. 3 *Facio ut des*. 4 *Facio ut facias*.

Quasi contracts were implied obligations which supposed a previous agreement. Of all these species of contracts in their order.

OF NOMINATE CONTRACTS, AND FIRST OF CONTRACTS, EX RE.

Real contracts were those in which, besides the consent of the parties, the delivery of something was required to perfect the obligation. They were four in number. 1 *Mutuum*. 2 *Commodatum*. 3 *Depositum*. 4 *Pignus*.

Mutuum.]—Was the loan of consumable goods, of money, wine, corn, and other things that might be valued by number, weight and measure, and were to be restored only in equal value and quantity, and not the same specific and identical things. The absolute property was transferred to the borrower, *i. e.* they were lent for consumption, but he was answerable for their value, and therefore must bear the loss if they were destroyed by

(10) Such actions in prescribed terms were not distinguished by any specific names, but delineated by circuitry and periphrasis. See Pandects, 19. 5. 5. Powel on Contracts, 1 vol. p. 335.

wreck, pillage, fire, or other inevitable misfortune (11).

Though the specific thing was not to be restored, yet something must be restored of the same nature, as well as of the same quantity and value; wine could not be returned for oil, or corn for wine: if it was, it was not a *mutuum*, but an exchange—not a nominate, but an innominate contract. To illustrate this contract still further, living animals could not be the object of a *mutuum*, because equal numbers might be of different value. The *mutuum* is a contract of borrowing; it is intrinsic in its nature, that it should be gratuitous without price or reward; if they followed, it would be changed into another contract, that of hiring; yet by special agreement there might be interest on it, but that was foreign to its nature, and did not spring from it. But its nature will be still better understood by the description of enumeration, viz. *Commodatum*.

Commodatum.]—The *mutuum* and *commodatum* were both contracts of borrowing, both of them supposed to be done to oblige the friend or

(11) See Jones on Bailments, p. 49. *Mutuum* is not classed with bailments, because the identical thing was not to be restored to the owner, but another thing of the same quantity, nature and value. Sir W. Jones definition of bailments being a delivery of goods on condition, expressed or implied, that they shall be restored by the bailee to the bailor, or according to his directions as soon as the purpose of the bailment be answered.

neighbour, and conveying or containing no idea of price or reward in their own nature, though they might by special agreement; but herein they differed: The thing commodated was to be returned in specie, not merely in quantity and value, the very specific thing was to be returned—it therefore must be something that did not consume in use. Thus a horse was a proper subject of commodation; corn, wine or oil, of mutuation. Mutuum was loan for consumption; commodatum loan for use; in the former the property of the individual thing was changed, though its value was returned; in the other the same person remained owner, though the use was alienated for a time (12).

The sixth title of the thirteenth book of the Digests should be read upon this subject: although this contract was a grant without reward, by which it was distinguished from letting to hire and from innominate contracts, and was also for a certain time, (by which it was distinguished from a precarium, or grant at will) it induced

(12) The Latin language very happily expresses the fundamental difference between *commodatum* and *mutuum*, which the poverty of ours confounds under the vague appellation of loan; in the former the borrower was obliged to restore the same individual thing with which he had been *accommodated*, for the temporary supply of his wants; in the latter it was destined for his use and consumption, and he discharged this *mutual* engagement by substituting the same specific value, according to a just estimation of number, weight and measure. Gibbon, vol. 4. p. 331. octavo.

obligations upon the lender which may appear extraordinary, such as making him liable to an action, if the thing lent had defects known to the lender which injured the property of the borrower, as for instance a corrupted vessel (13); or if he recalled the loan before the term expired: and, on the other hand, the borrower was subject to damages if he employed the thing lent to any use but that specific one for which it was borrowed (14), and to interest if he kept it beyond the time limited. He must bear all necessary charges arising from the use of the thing lent, and could not detain it under a pretence or claim of debt (15).

And as this contract was entirely for the benefit of the borrower, he was answerable for the slightest neglect; if the loss was occasioned by extraordinary accident he was excused, but to expose the *commodated* property of another to the perils of a journey or a voyage, made him evidently answerable for the voluntary risk (16).

(13) D. 13. b. 18. 2.

(14) D. 13. 6. 7. Si tibi equum commodavero ut ad villam adduceres, tu ad bellum duxeris, *commodati* tonebris.

(15) Code, 4. 4. 23. 4.

(16) Inst. 3. 15. 2. *Propter majorem vim, majoresve casus, non tenetur, si modo non ipsius culpa is casus intervenerit, atque, si id, quod tibi commodatum est domi, peregre tecum ferre malueris, et vel incurju hostium prædonumvi, vel naufragio, amiseris, dubium non est, quin de restituenda ea re*

Depositum.]—Was a contract by which a thing was committed to the custody of another, to be kept without reward, and returned on demand. In the two last contracts the interest of the receiver was regarded principally, in this only the advantage of the person depositing: the thing deposited was not to be used, another distinction from *mutuated* or *commodated* property; fraud and unfaithfulness in the bailee were punished by an obligation to restore two-fold (17). If the thing was deposited in a cabinet, and under lock and key, without depositary's being informed of the contents, he was only answerable for return of the cabinet back as he received it. If acquainted with the particulars contained, he was answerable for every particular (18). The depositary was answerable only for fraud, but gross negligence would be construed fraud: the conservation (19)

tenearis; Puffendorf in vain endeavours to argue the contrary. Sir Wm. Jones has shewn in his essay on bailments, that the principles of our law on this head are the same: *Commodatum* is one of the five species of bailments, by him acknowledged; the others are *depositum*, *pignori acceptum*, *locatio* and *mandatum*. With each of these heads therefore the student should read the correspondent parts of that work of elegance, written by that prodigy of parts and information Sir W. Jones, attending particularly to the great question of responsibility for neglect, on which Mr. Justice Blackstone has said little or nothing.

(17) Dig. 16. 3. 1. 1. (18) Ibid. 16. 3. 1. 41.

(19) Our law agrees, according to Sir W. Jones, (who confutes Lord Coke on this subject,) in his essay on bail-

of the thing being rather intended as a burthen than a benefit to him, only ordinary care was required from him; but a depositary might, by special agreement, make himself more responsible: so he might by a spontaneous officious offer, for thereby he may prevent their being deposited with a person of more vigilance.

The depositary was not to use the thing deposited, Inst. 4. 1. 6. he had not even a limited property in it, as our depositary has; his possession was considered the possession of the person depositing. I suppose, however, that common rea-

ments, where he divides neglect into *ordinary*, i. e. the omission of the common care which a prudent man takes of his own concerns; *gross*, the want of that care which every man of common sense, how inattentive soever, takes of his own concerns; and *slight*, the omission of that diligence, which very circumspect persons use. The civilians distinguished *culpa* into *lata*, *levis*, *levissima*.

Sir W. Jones observes, that it has been said, that *culpa*, by the barrenness of the Latin language, includes, as a generic term, various degrees or shades of fault, which are sometimes distinguished by epithets, and sometimes left without distinction; and that the divisions of neglect are rather to be looked for in the Greek translations, a language rich and flexible, and having terms expressive of every shade: but he is of opinion that the Greek jurists were not perfectly acquainted with the niceties of their own language. With respect to the depositary, he is even of opinion, that if he be a careless man, and his character known to the depositor, and he takes no better care of *his own* goods, that he is not responsible even for gross neglect.

son must have dictated an allowance to him to use the thing in a qualified manner, if it must have been injured by total non-use, as an animal (a sporting dog for instance) for want of exercise and practice; but clothes were not to be worn. Quæræ, as to books.

Under deposits the civil law considers deposits *pendente lite*, and gaming deposits; the former it terms *sequestrations*; *apud sequestrem deponitur cum aliqua res in controversiam deducitur* (20). Playing for money, and depositing the stake, was allowable, where the game was of a noble kind, such as a trial of strength or agility in the course or the palæstra; but if the wager or bet regarded not some exercise honoured by public estimation, and useful in the school of war, gaming was disallowed, and all securities for the same avoided; or if the money was paid, it was recoverable again, with one exception of allowance to the higher orders, to play for small sums. *Ad singulos congressus unum numisma seu solidum deponere*. Code, lib. 3. tit. 43.

Pignus.—As the civil law did not distinguish (in delivering its rules and principles) between mortgages of land and mortgages of goods, and considered both under the head of contract; in varying from that order, and considering the for-

(20) D. 16. 3. 17. The sequester, like a receiver or administrator, pen. lit. was to preserve the thing safe, to sell perishable goods, and to allow the party aliment, and sometimes costs to carry on the suit.

mer under estates upon condition, I have necessarily exhausted most of the material regulations applicable also to the latter: such as redemption, priority, &c. &c. As our law, however, clearly makes the distinction, calling the latter pledges or pawns, I will not pass them unnoticed in the spot assigned to both by the civil law, but shall confine myself chiefly to the degree of care required from the pawnee, and the extent of his power as to using the pledge.

The *mutuum* and *commodatum* were for the sake of the receiver only, and the *depositum* for custody and advantage merely of the person depositing, but the *pignus* or pledge was for the advantage both of creditor and debtor; from the pawnee therefore ordinary care was required in the keeping of the pledge (21), something more than that usually exercised by men in *general* about their private affairs, whatever may be the caution of certain more prudent individuals. If therefore the pledge was stolen, not only the debt was dissolved, but the pawnee was also answerable in damages: but if it was taken by violence, as by open robbery, the creditor did not lose his debt, nor was he answerable for the value, unless it had been expressly stipulated between the parties, that the loss of the pledge should dissolve the debt (22).

(21) Sir W. Jones again proves this to be the rule of our law in opposition to Lord Coke.

(22) Code, lib. 4. tit. 24. *de pignoratitia actione*. *Creditor*

The pawnee might use the goods, if the using was attended with no prejudice, or rather if it was necessary, as the milking of a cow, but the benefit or value of the milk, or such like produce of the user, resulted to the pawner (23). As in immoveables so in moveables, if payment was not made of the principal debt within a certain time, the creditor might alienate and sell the same. The person was not discharged by the pledge given if it did not answer the debt ; if the debt exceeded the value of the pawn, an action might be brought for the remainder ; and if the pledge was evicted, the pawnee became personally liable to the creditor in damages.

CONTRACTS EX VERBIS.

Stipulations.]—These were solemn promises confirmed by certain solemn and set form of words, by question and answer, such as *spondeo ? spondeo ; promittis ? promitto*. If the promiser to

plgnora, quæ fortuitis casibus interciderint (in quibus aggressura latronum) præstare non compellitur, nec a petitione debiti submovetur, nisi inter contrahentes placuerit, ut amissio pignorum liberet debitorem. Sir W. Jones shews the usage of modern Constantinople to be the same.

(23) If pawnee lose goods without any default in him, it shall be the loss of the owner, but if using be no prejudice to the goods, he may use them, Salk. 522. The instance of milk is put, Owen, 124. but by our law the milk or produce, as calves, &c. &c. would belong to the pawnee.

promittis had answered *spondeo*, it would have been invalid; they conveyed the idea of a firm and irrevocable contract, and their object was to sustain the validity of a gratuitous promise, or promise without consideration, which for that very reason required the most cautious and deliberate consent. The questioner was the stipulator or creditor, the promiser was the debtor, and thus it was that in this one case the rule of the civil law *ex nudo pacto non oritur actio*, seems to be infringed, or to speak more properly, where the contract was made by this solemn form of words, it was not a *nudum pactum*, although without consideration (24).

Under this head of stipulation, much useful

(24) *Ex nudo pacto non oritur actio* is the rule of the civil law, as well as of ours; but the meaning of *nudum pactum* is very different in the two laws. With them a verbal agreement, if attended with a certain solemn form of words, and then called a stipulation, was valid, though without consideration, and not *nudum pactum*. With us all verbal agreements, without consideration, are invalid, and *nuda pacta*.

With them agreements, though in writing, at least until ratified by time, did not import a consideration, and even though they actually expressed one, it might be disputed during that time. With us deeds import a consideration, but writings of a less solemn nature do not, unless negotiable at law, and the interests of third persons concerned; they may be evidence of the agreement, or intent of the parties, but not conclusive evidence of sufficient consideration. See Rann and Hughes, 7. Term Reports, 350.

information respecting contracts in general is to be collected from the civil law (25); every stipulation was to be performed simply, or at a day certain, the day was added for the sake of the promiser not of the stipulator, the whole day therefore was allowed him for payment (26).

A grant nominally for life, as of an annuity, was construed by metaphysical subtilty to be perpetual, and yet this ridiculous rigour was rendered null by the aid of fiction. If place or time were added for the sake of the creditor, he was not obliged to accept payment but at the place or time agreed (27); every thing which could be made the subject of property might be the subject of stipulation; but madmen, deaf and dumb, prodigals and minors, could not enter into this contract; a man could not promise for the act of another, except under a penalty, but he might promise that he would *cause* another to do a certain thing. If an impossible condition was

(25) As with us, rent is not due till the last moment of the day.

(26) This very odd rule arose from this subtilty, much more resembling the scholastic spinosity of the middle ages than the strong good sense of ancient Rome; *naturalia non possunt tollere civilia, tempus est naturale, obligatio civile quiddam. ergo tempus non est modus tollendæ obligationis*: but the heir got rid of the annuity by a supposed and imaginary release from the stipulator.

(27) Dig. 41. 1. 12. 2.

added to the obligation it was null, and a simple obligation arose, the performance of which might be instantly demanded (28).

A contract by stipulation to be executed after the deaths of the parties, (before the time of Justinian) was not valid : because an obligation could not begin from the heir, nor could a man bind his heir without binding himself, from their imaginary unity.

Under the title of stipulations the civil law has also treated of contracts contrary to good morals or sound policy, which are all thereby avoided (29).

It must be noted, that the forms of stipulation were abolished by the Leontine Constitutions, and that long before prætorian relaxation and

(28) Our law distinguishes between conditions precedent and subsequent, and between conditions possible and impossible at the time of the making : so, if the undertaker neglected to weigh his own strength, or alone knew the impossibility, he is answerable in damages.

(29) *Paçta quæ contra leges, constitutionesque, vel contra bonos mores nullam vim habere, indubitati juris est.* Code, lib. 2. tit. 3. 6.

Quod turpi ex causa promissum est non valet. Inst. lib. 3. 20. 23. but suppose the money paid, *ubi & dantis & accipientis turpitude versatur repeti non potest, ubi solius accipientis potest; sed quod meretrici datur, repeti non potest, non enim turpiter accipit;* a strange position. See Dig. lib. 12. tit. 51.

How far a particeps criminis would be relieved, see Dig. lib. 12. tit. 51. l. 3. 4.

legal ingenuity were combined to put all equitable agreements upon as firm and solid a ground. These stipulations had been four-fold, *judicial*, as when security was ordered to be given against fraud; *prætorian*, as when security was demanded *de damno infecto*; *conventional*, by the agreement of the parties; and *common*, for the security of a minor.

Sureties.]—Others frequently bound themselves for the man who promised, and these sureties were called *fide jussores*. They might be received in all obligations whatsoever, and they bound not only themselves but their heirs, even without express mention (30); such was the case, says Wood, in all contracts, whether proper or improper, and all the sureties were bound severally, although not so expressly specified. The *fide jussor* had the advantages called *beneficium ordinis*, by which he could force the creditor first to sue the principal, and *beneficium cedendarum actionum*, that of obliging the cre-

(30) No so with us as to the heir, but the executor is bound without express mention.

The securities taken in the court of admiralty in the nature of bail, are stipulations and *fide jussory* cautions, and so called. A prohibition would go if that court took a recognizance, it not being a court of record; there were great contests on this subject formerly. See Zouch, Godolphin, and 2 Lord Raymond, 1285. These stipulations have no priority before specialty debts, nor do they affect lands.

ditor to assign to him on being paid, to enable him to sue a fellow surety. Minors could not be sureties nor soldiers (31); nor women by the *senatus consultum velleianum*.

Surety might pay before action brought (32); if surety was in peril, he might sue before term of payment, to be indemnified or discharged (33); if no personal security could be had, creditor might have a juratory caution from his debtor.

CONTRACTS EX LITERIS.

The contract by writing was called *literarum obligatio*; these written contracts after a certain time, if they expressed their cause or consideration, stopped the mouth of the contractor from denying his debt or obligation, even supposing he had not received that which he thereby acknowledged to have been to him paid or delivered (34): within two years, however, the debtor was not barred from pleading that the money was never paid, or goods delivered, and throwing the proof upon the creditor.

A stipulation, after being made in solemn form of words, might be reduced to writing.

(31) See Code 4. 65. 31.

(32) Dig. 17. 1. 10. 11.

(33) Dig. 17. 1. 38. 1.

(34) As with us, want of consideration cannot be averred by the obligor of a bond against the obligee, nor by the maker of a note against the indorsee.

CONTRACTS BY CONSENT (35).

Consent *alone* (without any thing delivered as in contracts *ex re*, or solemn form of words as in contracts *ex verbis*, or writing as in contracts *ex literis*) may make a perfect contract (36). It is divided into four branches: 1. *Emptio & vendicio*, the contract of sale. 2. *Locatio & conductio*, the contract of hiring and letting to hire. 3. *Societas*, or partnership. 4. *Mandatum*, or commission.

Contract of Sale.]—By the civil law, all contracts of sale were good without writing, to whatever value they extended (37). The Insti-

(35) The wide and various subject of contracts by consent is spread over four books (from 17th to 20th) of the Pandects, and is one of the parts best deserving the attention of the English student. Gibbon, vol. 4. p. 330. octavo.

(36) This does not mean consent without *consideration*, but consent without the requisites mentioned in the preceding species of contracts. This contract might be made between persons, though absent, by letter; or through intervention of others: stipulations required the presence of both parties.

(37) Our statute of frauds has made the law with us very different; it enacts, that no contract for the sale of goods, wares, or merchandises, for the price of 10*l.* and upwards, shall be good, except the buyer shall accept and actually receive part of the goods so sold, or give earnest to bind the bargain or in part payment, or unless some note or memorandum in writing be made and signed by the parties, or their lawful agents.

tutes begin their precepts on this contract, by declaring that it is perfect as soon as the price of the thing is agreed upon (38); and there not only ought to be a price, but a *certain* price, which Justinian ordained should be considered as containing sufficient certainty, if the agreement was, that the thing should be sold at a price to be fixed by a third person; if the price was fixed, the buyer might have the action *ex empto* against the seller for delivery of the goods, the seller an action *ex vendito* for the price, though no writing or earnest (39); not so if no price was fixed, and therefore the Institutes say, 3. 24. 1. at the end of the section, *de emptione pura, &c. &c. Nulla emptio sine pretio esse potest*. But if the goods were delivered without price fixed, the price might be settled by testimony of their value, and in such case the smallest value was adopted.

(38) Read upon this whole contract the twenty-fourth title of the third book of the Institutes *passim*; the title is, *De emptione & venditione*.

(39) Besides the actions *ex empto & vendito*, there were four *prætorian* actions applicable to this contract: *Redibitory*, to compel seller who did not discover faults in the subject matter to the buyer, to take the goods again, and for damages. *Quanto Minoris*, for reduction of price, when both ignorant of the fault. *On the case*, for knavish concealment. *Estimatory*, when the goods sold for more than their value, from false commendation or puffing; a sad restraint upon Roman auctioneers.

But these rules respecting the perfection of this contract, were altered by Justinian when the contract was in writing; there was no obligation to put it in writing,—writing was not essential, but if insisted on by the caution or jealousy of the parties, it must be attended with certain solemnities to obtain the *fidem instrumentorum* (40). The instruments of sale were to be written by the contracting parties, or at least signed by them; and without these precautions, or if they were drawn by a public notary (*tabellione*) if any the smallest formality was omitted, they might recede from their bargain with impunity, unless *arrha* or earnest had been given. Though earnest did not constitute the contract, but served only as proof of it, and though without it, as we have said, the contract was complete, and rights of action vested, yet it did subject the buyer, if he receded from his bargain, to the loss of that earnest (41), and the seller to damages in double its value.

(40) See Code, l. 4. tit. 21. *De fide instrumentorum*, a title very worthy of perusal, C. 17. Quas in scriptis fieri placuit non aliter vires habere sancimus nisi, &c. &c.

(41) Sir W. Blackstone represents our law as differing, and says the property is absolutely bound by the earnest, amongst us. Mr. Christian thinks otherwise (and quotes 1 Salk. 113.) so does Mr. Justice Buller. And undoubtedly they are right, if Mr. Blackstone meant that the property was transferred, which I do not conceive he could. Earnest has the same effect with us, which fixing

The Roman lawyers were much divided on the question, whether the price must always consist of money, or whether it might not be composed of other commodities;—in other words, whether *commutation* was or was not a species of contract separate from vendition. The Proculeians and Sabinians, two great parties at the Roman bar, (whose great ground of contest seems to have resembled one not unknown to modern times, viz. whether equitable construction and prætorian laxity should encroach in the legal forum on the rigid lines of strict law) espoused different sides of this agitated question. The distinction was considered by the Proculeians as important, because different rules were applicable to *jûle* and to *exchange*, in determining, for instance, *when* the property vested, and who should be liable to intervening loss between the contract and the delivery. Their opinion prevailed, and received the sanction of the Imperial court (42).

the price had in the civil law: it binds the bargain, so that the vendee has a right to the delivery of the goods, on demand within a reasonable time. But both by the civil law and ours, the property is in the seller till delivery, *qui nummum rem emptori tradidit, adhuc ipse dominus est*, say the Institutes. Lib. 3. tit. 24. sec. 3.

(42) Lawyers, in all periods, have been ostentatious of displaying classic taste, though the rest of the world has not in general acknowledged much connection between law and Belles Lettres. Even the grave Littleton, as Lord Coke says, *quæsteth verses*; but perhaps none but the Roman

The Institutes, in the next place, treat of the risk or profit between the time of the contract made and delivery of the subject (43); the moment the price was fixed, the risk rested on the buyer; and he became liable to all accidents, which happened without the fraud or fault of the seller, unless the seller especially took the risk upon himself, or unless the loss was occasioned by his improper delay of delivery (44). The seller in his turn was obliged to assign over all rights of action existing in him to the buyer, to compensate his risk and aid his claims.

Inadequacy of price was no cause for annulling the contract, (as it is in our courts if the bargain be plainly iniquitous), but the civil law, with respect to immoveables at least, fixed the term of that inadequacy which should defeat the con-

lawyers ever quoted them as legal authorities. The Proculians and Sabinians, in the controversy mentioned above, appealed to Homer; and Justinian in his Institutes, and Paulus in the Pandects, have gravely introduced their quotations from the Iliad and the Odyffey.

(43) Institutes, lib. 3. tit. 24. sec. 3. *de periculo et commodo rei venditæ.*

(44) I should recommend to the student to compare here, with the tenets of the civil law, the cases collected by Mr. Justice Buller, in treating of the action of trover. Such as Colston and Woolston, &c. &c. The buyer with us appears not to be liable to the risk, until he actually gets possession, or the goods be delivered to a carrier or conveyance chosen by himself.

tract, viz. half the real value. Circumvention, therefore, in all cases, at least to half the value, it seems to have allowed, (*mirabile dictu*), whereas our law, and the law of reason, would consider the nature of the transaction, and not authenticate partial fraud; but on the other hand, it demands a manifest preference to our system, in obliging the seller not only to warrant the title, but to warrant the goodness of the commodity. He was obliged, if he wished his bargain to stand, to explain every fault within his knowledge (45) to the buyer, or else there was an *implied* warranty of their good quality: whereas with us the maxim is *caveat emptor*, and if the seller does not disguise, or misrepresent, his silence does not make him responsible; he must *expressly* warrant to subject himself to responsibility (46).

The seller seems to have had an advantage not given by our laws, that of interest on the payment if delayed (47), and on the other hand, the buyer was privileged in being entitled to damages for

(45) Dig. lib. 21. tit. 1. c. 1. f. 1.

(46) It is very extraordinary that these codes should have each of them adopted in its turn maxims seemingly the most inequitable; with respect to one article, viz. *borfes*, it seems to be now agreed, that with us a sound price implies sound goods; in the name of reason why should not the maxim be universal?

(47) It has been proposed to make shop debts bear interest.

eviction, even though the sale was in market overt (48).

Some special covenants, usual at Rome, deserve notice; it was sometimes covenanted, that at any time, before a certain fixed day, the seller might contract with any other person who would offer a better price, which covenant was called *addictio in diem*; or that if the price was not paid before a certain day, the bargain should be void, an agreement called *pactum commissorium*; or that the seller should have a preference in repurchase, if the buyer grew tired of his bargain, a reservation called *jus retractus* (49).

Some regulations also of a political nature respecting this contract are worthy of attention: Monopolies were strictly prohibited; the farmer was sometimes obliged to bring his corn to market, the price of commodities might be fixed by the magistrate, and combinations to enhance the price of work were punished with severity, ordinances not neglected by our statute law (50).

(48) D. 18. 6. 19. (49) D. 18. tit. 2. 3. and 5.

(50) With the price of commodities, our laws however have meddled very sparingly, nor am I so little acquainted with writers on political economy, not to be attached to those who condemn forcing by bounties, or curbing by prohibitions; yet though the doctrine in general may be true, that the market should always be left to find its own level, yet I will not say that they are never to bow to circumstances; I will not say, that when a neighbouring nation fixed an ultimatum to the price of provisions, they might

It is under this head that the civil law considers those restraints on purchase, which, in compliance with the mode of our law, I arranged under Title by Alienation. Thus the prohibition as to things sacred and public, to estates under substitution or entail, to the *fundus dotalis*, and as to alien purchasers, are enumerated under this contract in the Pandects and Code; and the conveying (51) of arms and contraband goods to enemies, is also specially prohibited in the latter.

Though the civil law was minute in its regulations of trade, it did not pay honour to the commercial system, as appears from Code lib. 4. tit. 63. *de commerciis et mercatoribus*. In its

not have been for the moment wise; nor would I venture to pronounce that a temporary legal restraint or ultimatum to the price of lands in this kingdom, viz. that it should never exceed a certain proportion of the profits of the ground, and thereby give to the terre-tenant the encouragement which political economy requires, would be altogether a wild idea. But perhaps it is too adventurous for laws to meddle with that which time and reason, and the real interest of the head landlord will probably cure, unless the ignorant impatience of the tenant prevent it.

(51) Dig. 18. 1. 34. 1 and 2.

Code 4. 51. 7. Holland, in the excess of commercial avidity, while it embraced with eagerness most of the provisions of the Roman law, rejected this; and the Dutch, at the siege of their own towns, have *legally* supplied the enemy with ammunition. Groenweg. de legibus abrogatis.

third section it is said, *nobiliores natalibus et honorum luce conspicuos, et patrimonio ditiores, mercimonium exercere prohibemus, ut inter plebeios et negotiatores facilius fit emendi vendendive commercium*. Unless perhaps it be said, that this was to prevent the smaller traders from being overpowered. A comparison between the contract of exchange, and the contract of sale, will elucidate the meaning of contract by consent in the Roman law. Exchange was not perfected by *bare consent*, actual permutation must take place before the contract was perfect, from an agreement to exchange no action arose, nor could the risk be transferred from one to another before actual permutation, so that the distinction between these contracts was far from being nominal.

Under the head of exchange (52), or commutation, Wood draws in money, exchange, and banking. Bankers there were at Rome called *Nummularii et Argentarii*, but how far they resembled modern bankers it would not be easy to ascertain. They seem to have been also notaries public, and with them mortgages and other transfers of property were registered. As to bills of exchange, they are generally held to be of modern invention; and Mr. Blackstone traces the origin of paper credit to China, about the thirteenth cen-

(52) Ayliffe seems to conceive that a transaction mentioned Dig. 14. b. 16. resembled a son's drawing a bill upon his father.

tury ; *cambium* exchange comes from an obsolete word *cambio permuto*.

Contract of hiring.—The civil law always affecting extreme accuracy in treating of contracts, labours to draw exact limits between the contract of hiring, and the contract of sale : the boundary may be sometimes nice, and the distinction necessary : they agree in this, that as the former contract is complete by settling the *price*, so is the latter by fixing the *hire* ; and the hirer or *conductor* is immediately entitled to his action *condicti*, as the *locator* or letter to hire is to his *actio locati*. They agree also in not requiring any solemn form of words, in the contract being reciprocal, and in the price or hire not being payable if eviction *in limine* : they differ in this, that in bargain and sale, the contingent hazard falls on the buyer ; in hiring and letting to hire on the letter or *locator*, unless the contrary be agreed on, or the hirer be in fault.

Hiring might be either hiring of property, as of land or cattle, or hiring of labour or skill ; of the labour of a workman or skill of a physician : of the hire of immoveable property, we have treated under the head of Leases ; of the hire of moveables I shall here treat as far as respects the care and diligence required in the hirer. The diligence and care to be used, according to Sir W. Jones, was ordinary diligence, such as a prudent man would use about his own property. If a horse was hired, it was to be rode and used as

a man of common discretion would use his own horse. If furniture was to be hired, no damage was to be reimbursed but what arose from the want of ordinary care, either in the hirer or his servants (53), and for the last the master was not always answerable. But for the minutiae of this learning I must refer the reader to the 2d title of the 19th book of the digests, *locati conducti*, and particularly to the eleventh section, which begins *videamus an et servorum culpam præstare conductor debeat*, and instances in cases of fire, &c.

The hire of labour *locatio operis*, is, by Sir W. Jones, divided into two branches, *faciendi et mercium vehendarum*: through them both, Sir W. Jones insists that the same principle prevails; that ordinary, and not the most exact care and diligence is requisite. Thus the inn-keeper repels the presumption of knavery or default, by proving that he took ordinary care, or that the force which occasioned damage to the goods was irresistible, though he is liable *prima facie* for all goods of his guest stolen or lost by the negligence of him or his servants; and the carrier for hire, (though his being made liable for the value in case he be robbed, seems to be a contradiction to

(53) Here again Sir W. Jones has shewn, not only that this was the doctrine of the civil law, notwithstanding some mistaken passages, but that our law agrees, and that both agree with the laws of the wisest nations, even of the Persians, Turks, &c.

the rule, as that seems to be inevitable accident), has been laboriously argued by the same learned author to be within the same rule; for, says he, this is only an exception introduced by the great maxims of policy and good government, lest confederacies should be formed between carriers and banditti; so that the loss is not considered as being of necessity, or always owing to inevitable accident (54.)

Thus far I have implicitly followed Sir W. Jones, but delightful as his attempt to harmonize the opinions of all civilized nations on the subject of bailment is, some may be startled by its application to the labour and skill of men in the learned professions; to say that from the lawyer or the physician (55), ordinary care and diligence

(54) Sir W. Jones thinks, that in the rule concerning a common carrier, viz. that nothing can excuse him but *the act of God*, or of the king's enemies, in the place of the first exception, it would be more proper, as well as more decent, to substitute *inevitable accident*.

(55) Gentlemen of these faculties, though they might be expected to be termed *locatores*, in speaking of this contract are called *conductores*, i. e. they were considered as hirers of the work to be done, *operis faciendi*, though in their turn they *located* or hired out their pains and skill. The Roman law, though it brought the labour of these professions under the head of this contract, was anxious to distinguish that of the lawyer, by saying, it was not *merces*, but *honorarium quiddam*, not *price* but *reward*; a distinction much more justly claimed by the modern lawyer, who cannot bring an

only are requisite, and that they are not responsible for deficiency in the most exact attention to the affairs of the client or disease of the patient, or at least that the omissions for which they could *veniam dare* to themselves, they would have a claim *vicissim petere* from others, may not be perfectly reconcileable to common opinion. A surgeon has been made liable in damages for deviation from common practice, and an attorney for omissions seemingly pardonable.

I believe, however, it will be found that his principle, well examined, is right, and that nothing but the want of common ordinary reasonable diligence, could affect the pocket of the

action for his fees: for Antoninus Pius ordained *juris studiosos, qui salaria petebant hac exigere posse*, Dig. lib. 50. tit. 13. In the same title is ascertained what shall be deemed the liberal arts, among which medicine is ranged, *medicorum eadem causa quæ professorum, nisi quod justior, cum hi salutis hominum illi studiorum curam agant*. The contempt for these professions in France did not originate with the civil law.

It appears from Tacitus, that in the reign of Claudius Cæsar, the bar was dishonoured by astonishing perfidy after the receipt of immoderate donations; a great clamour was raised, and the enforcement of the Cincian law loudly called for, by which it had been of old provided, *ne quis ob erandum causam pecuniam damnorum accipiat*. It was complained *inimicitias, odia & injurias foveari, ut quomodo vis morborum prætia medentibus sic feri tabes pecuniam advocatis ferat*; the result was, that the Emperor fixed the highest fee of an advocate at *dena sesteritia*, about 80l. 14s. of our money.

practitioner through the medium of a verdict, however it might through the medium of his character (56). Yet to support his general principle, he has combated not only with a great modern opinion, but with that of one very celebrated in his time, the Roman Caius, who says, *Qualem diligentissimus pater familias suis rebus adhibet*. This authority the ingenious judge opposes by stating the energetic temper of Caius, (whom Justinian in his Institutes usually follows) who was fond of superlatives, while his meaning was much weaker than his words, a liberty which few would venture to take to change the words of an opinion, from knowledge of the impetuosity of its framer.

Under the contract of hiring, the consideration of *interest* is naturally introduced. The thirty-second title of the fourth book of the Code treats *de usuris*, in its 27th section, fixes the rates of interest demandable by various persons. Great and illustrious persons could only demand four per cent. legalised traders might demand eight, but *pecunia trajeclitia*, or money lent on bottomry, might bear *centesimæ usuræ*, or twelve

(56) In fact this principle does not differ from the common sentiment, for ordinary diligence in this case means a degree adequate to the performance of the undertaking. Lord Holt and Mr. J. Blackstone make no distinction between a commodatum and a locatio, in speaking of this contract. Inst. lib. 3. tit. 25. *Custodiam*, &c.

per cent. interest, which was the highest rate allowed at Rome (57). In ordinary cases six per cent. was the legal rate, and to exceed this, or make an usurious contract, was severely punishable, positively by mulcts, negatively by incapacities. I have observed that a usurer could not even make a testament.

Mr. Gibbon says, that Justinian does not deign to treat of interest in the Institutes. But in the Code and Pandects, many rules respecting it are given, among which two of the most notable are, that interest shall never exceed the principal, and that interest shall not be given upon interest. In the times of the Republic, no interest could be demanded except by special agreement. The Emperors gave it on all contracts, *bonæ fidei*, and also on legacies and trusts: interest was not esteemed by the civil law a natural produce, but given only to recompence delay of payment, and if the cause were in its own nature unproductive,

(57) Mr. Gibbon seems to agree with me in thinking, that twelve per cent. was the highest interest allowed in any case in the times of the emperors. Wood and others represent interest on bottomry as unlimited as the risque. The Roman method of computing interest has been perfectly explained by Mr. Blackstone in a note to Book 2. ch. 30. the principal was supposed to consist of one hundred parts, if the amount of one of these parts was paid monthly, it was *centesimæ usuræ*, or twelve per cent.

it was not given before demand in a court of justice (58).

Societas.]—Partnership with the Romans was either in some particular thing or subject, or in joint labour and its profit, or in goods advanced by one, and labour or work by the other, or in the whole property of the parties; in the latter case, any new acquisition by inheritance or gift, subsequent to the contract of partnership, did not come into the common stock.

(58) So with us upon bonds, no interest beyond the penalty, and interest not allowed upon interest, with some special exceptions. When the reader finds a title in the Digests, another in the Code, and a third in the Novel Constitutions, *de nautico fenore*, he might expect much information upon bottomry and insurance. But the titles are short, and the information brief and general. They tell little more than that the creditor on bottomry shall, on account of the risque, be entitled to extraordinary interest, determine the commencement and duration of the risque, and illustrate the general doctrine by one or two examples. In modern commentators on the civil law, and not in the text of the civil law itself, we are to look for information on these important subjects. From these, learned judges, and Lord Mansfield particularly, derived much of that copious information which they have transferred into our law, which transfusion, illustrated by reporters, and by Molloy, Beawes, Welsket, Parke, and Miller, may, unless when very special cases arise, save the trouble of much further search. However, within modern experience, causes have occurred, in which a search into the modern voluminous works of foreign commentators, has repaid the pains.

The view which the Institutes take of this subject (for they do not here treat of partnership in lands, which has been spoken of above in the chapter of Joint-tenancy) is quadruple.

First. Of the shares of profits or loss.

Secondly. How partnerships were dissolved.

Thirdly. The diligence and care requisite in partners.

Fourthly. What actions lie ultimately between them.

If no express agreement had been made, the loss was to be equally borne, and the profit equally divided, or rather in proportion to the shares advanced by each contributor. Much controversy had existed among the Roman lawyers, whether a special agreement, that one partner should receive two-thirds of the profit, and bear but a third, or perhaps no part of the loss, should be valid; Mucius supported the negative, Sulpicius the affirmative: the opinion of the latter, supported by the reflection that the labour of the one may be as important as the money of the other, ultimately prevailed; if one partner gained by means of the common stock, the profit must be divided of course; but if any gain accrued, or loss fell upon him in consequence of transactions unconnected with the partnership, he alone was concerned (59); each party was entitled, out of the common stock, to reasonable maintenance for

his family, but to no allowance for expences occurred by gambling or other vices (60). Partnership was implied, if men lived together and acted as joint traders, or if a payment was made by one in the name of the partnership (61).

Partnership was dissolved by death of one of the partners, if there were ever so many; the partnership itself could not be made to descend on heirs (62), but the partnership covenants might; the profits passed to the heir, though the partnership did not (63). This contract was also dissolved by any one partner renouncing the society, but if he did this from a fraudulent motive, or secret view of screening his own property from fair debts, he was counteracted by the providence of the law.

Accomplishment of the purposes of a special and limited partnership, confiscation, insolvency, bankruptcy terminated this union; but covinous attempts to defeat creditors were opposed by or-

(60) D. 17. 2. 52. 15. 10.

(61) With us, sale by one partner is sale by all; payment to one is payment to all; dealing with one generally in matters concerning their joint trade, charges all; but a *fi. fa.* against one for his separate debt, does not affect the partner.

(62) D. 17. 2. 59.

(63) With us there is no survivorship among partners in trade and merchandize; if of two partners one dies, a creditor may charge the other with the whole.

dinances not unlike our statutes to prevent fraudulent alienations (64).

The partner was obliged to observe only the same ordinary care and diligence in the affairs of the partnership (65), which he observed in keeping his own private property. Inst. lib. 3. tit. 26. sec. 9.

The action given to the partner was the action *pro socio*, which was directed on both fides (66); this action lay, if a partner had converted any part of the common stock to his own use (67), or received too great a dividend; so if he had sustained damage on account of the partnership, or laid out money on the common stock (68); so he might recover against the heir of a partner for the fraud or negligence of the person so represented.

Mandatum (69).—This contract includes authorities, and the powers of factors and attornies

(64) In these countries, dissolution of the partnership, publicly known, will prevent one from being affected by subsequent contracts made by the others, but does not invalidate previous demands against the joint stock.

(65) See Dig. lib. 42. tit. P. which is *quæ in fraudem creditorum facta sunt restituantur*.

(66) By direct, was meant a legal in contradiction to an equitable suit, which latter was called *Utilis Actio*.

(67) Dig. 22. 1. 1. 1.

(68) Dig. 17. 2. 52. 4. and 17. 2. 38. 1.

(69) See lib. 3. Inst. tit. 27.

where they acted gratuitously, and also bailments of property to be conveyed from place to place without reward (70); for it was essential to this contract that it should be gratuitous, since if the thing was done for reward, it became the contract of location and conduction; hence, Jones prefers the word mandate to commission, because commission generally includes hire.

The civil law distinguished mandates into those given for the sake of the mandator or mandatory, or both, or of a stranger jointly with either, or singly by himself; if the mandate was given simply for the sake of the mandatory, it was rather advice than contract, and not the subject of an action, unless it was fraudulently intended, and then the adviser was answerable.—D. 50. 17. 47.

If the mandate was contrary to good morals, it

(70) The celebrated case of *Coggs and Bernard*, was of a *mandatum*. The mandatory there undertook to carry brandy from one place to another, and in the carriage he managed it so negligently, that one of the pipes was staved; it was decided that he was responsible, though the defendant resisted on the ground that he had not undertaken to carry it safely and securely, because this was implied as far as ordinary care; and thus, says Sir W. Jones, a case which the first elements of the Roman law have so fully decided, that no court of judicature on the continent would suffer it to be debated, was thought in England to deserve very serious consideration. 2 Lord Raymond, 909.

was not obligatory, as to commit theft or any other crime (71).

The mandatory was not to exceed the bounds of his commission or authority, but the commission need not be observed *ad unguem*, it was sufficient if the probable mind and intention of the mandator was pursued. The diligence required of him was ordinary diligence, adequate, however, to the performance he undertook, unless by special convention he undertook for more, or by voluntary offer had prevented another who might have been more diligent from being employed (72); inevitable accident therefore excused, or violence, such as force and robbery, unless the party had unnecessarily exposed himself to that danger (73).

A mandate became null by being revoked *dum res integra sit*, before any act had been done in consequence of it; so it did by the death of either party while it continued entire, unless the thing to be performed was to be done after man-

(71) *Contra bonos mores* in the canon law, meant only acts *mala in se*, not *mala prohibita*. The civil law included both in this phrase.

(72) *Coggs and Bernard*. 2 Lord Raymond, 909.

(73) A. had undertaken as a friend to bring money from the country to town: on his arrival at night, instead of lodging the money at his own house, he walked in the streets with the money about his person, and was robbed; such a case, not many years since, came before a jury in Ireland, who gave the bailor a verdict against A.

dator's death (74). Every one was at liberty to refuse such a commission, as he would refuse a deposit; but if he once undertook it, he must either perform it, or renounce as soon as possible; for if he failed in his promise, or his renunciation was so late as to prevent the business from being properly executed, he was liable to an action, as he was if any damage ensued by the non-performance of a promise to become a depositary. We have now done with nominate contracts, and shall proceed to those which did not come under any of these specific classes, but were called by the name of innominate, for reasons which have been or shall be mentioned.

INNOMINATE CONTRACTS.

Contracts which arose from the express agreement of the parties (for supposed agreements produced merely by implication, were but *quasi* contracts) but to which agreements no specific name was given by the law, were therefore called innominate. These were such in which the compensation for the use of a thing, or for labour and attention, was not pecuniary; but either, 1. the reciprocal use, or the gift of some other thing, which class was vulgarly called *Do ut Des*; or 2. work and pains reciprocally undertaken, vulgarly called *Facio ut Facias*; or 3. the use or

gift of another thing in consideration of care, or labour, and conversely, *i. e. do ut facias*, and *facio ut des*. They were ranked into classes, therefore, by the considerations, by the thing given or done to induce the obligation ; the reason is evident, because as their classes or divisions could not, like those of nominate contracts, be descriptive of the ways in which they were formed, (inasmuch as these ways might be infinite), there was no other method of arrangement but by the considerations which produced them.

To illustrate the nature of these contracts still further, let us take the instance of exchange. A. lends his horse to B. to work in the field of B. on condition of having the labour of B.'s horse in his own, this is in the class of *do ut des* ; it is not a *mutuum*, the horse being an animal intended only for use, not for consumption ; it is not a *commodatum*, for there is a compensation ; it is not a *locatio*, for that compensation is not pecuniary ; it is then the innominate contract, ranked from its consideration under the class of *do ut des* ; for as ten thousand different instances may be imagined of these double bailments, they are not included under any nominate contract (75):

(75) It is not meant, that these considerations are not found in nominate contracts: the instances which Mr. Blackstone gives of them, are of nominate contracts. In the contract of sale, the consideration is, *do ut des* : in the contract of hiring out personal labour, it is *facio ut des* ; but the thing given then is money, and there was no occasion

if a mason or a carpenter are each of them about to build a house, and agree that one should finish the mason work, the other the wood work, in their respective buildings, it is classed under *facio ut facias*; if a man contracted to give a parcel of plate or books, in consideration of another manumitting a slave, it was *do ut facias*; if a carpenter undertook to build a house for a mason, on condition that the latter should give him not money, but a great quantity of mortar or brick, or other building materials, *fecit ut daret alter*.

As the infinite variety of agreements which might thus arise among men could not be foreseen or provided for, as settled specific forms of actions could not be previously prepared applicable to every case, the violation of an innominate contract was to be remedied by an action *ex præscriptis verbis*, formed in language applicable to the particular circumstances, and called also *actio in factum*, or on the case (76).

The same vigilance and care was requisite in innominate contracts, as in nominate, according to the case.

QUASI CONTRACTS.

Obligations quasi ex contractu (77), called also improper contracts, arose by implication from cir-
in describing them to introduce the considerations, they having specific names; but in innominate contracts, there is no other mode of description possible.

(76) From similar causes our action on the case came into use.

(77) Familiar to us under the name of implied contracts, or assumpsits.

cumstances without express or direct agreement ; the first noticed by the Institutes was *ex negotiorum gestione*, when one person assumed the care of the affairs of another without mandate in his absence, and without his knowledge. The absent person was obliged to approve of what was well done, to indemnify the agent to execute his promise, and reimburse his expences, if the undertaking was necessary ; if the undertaking was unnecessary, any loss fell upon the busy intermeddler (78), who at all events, as he interposed his services without being asked, was obliged to use the most exact diligence.

The next was *tutelæ administratio*, by which the tutor was impliedly bound, though there was no express agreement between him and the pupil.

The obligations of joint-tenants to consent to partition, and of the heir to pay a legacy, were especially enumerated among quasi contracts. But the obligation to repay money, which had been paid by mistake, or in error, which gave right to the action called *condictio indebiti* (79), is much the most conspicuous in this chapter of the Institutes.

(78) Dig. 50. 17. 36. Quere in these countries, if a man, without any order, intermeddle with the affairs of another, though to his advantage, could he have an action for his costs ? I have known the case warmly contested in a court of justice, but it did not come to a decision.

(79) Answering to our action for money had and received.

The Institutes having treated of the several species of contracts, terminate the third book, with an account of the persons through whom obligations might be contracted, and the manner in which they might be dissolved. But they dwell merely on the rights accruing to the father or master, from the contract of the son or the slave, and do not mention any counter obligation which could fall upon him through their contracts. In fact none could, any more than from the contracts of the wife; their contracts did not bind him, nor their promises, but promises to them resulted to him (80).

Obligations, whether arising from proper or improper contracts, might be dissolved by ways infinite in number, *e. g.* exceptione, testamento, pacto, sententia, jurejurando, tempore, *by plea in bar, by bequest, by release or counter bargain, by decree, by absolving oath, by length of time.* The Institutes, however, treat only of such solutions as arise by mere operation of law, and among them select only the most remarkable: these were by payment; by *acceptilation*, which was a release without payment, where the creditor in solemn form of words admitted the payment of a debt which in fact he had never received; by *novation*, which was changing the nature of

(80) Whatever the wife earns during coverture belongs to the husband. Salk. 114. the case of the slave cannot occur with us, and of the son is quite dissimilar.

the debt, as from a book debt to a bond debt, or changing the person of the debtor; *mutuo consensu*, when all the parties by agreement receded from an obligation not yet completed; this was peculiar to contracts by consent, or those called, as above, consensual. To these we must add some other remarkable modes, viz. legal tender, called *oblatio*; *compensutio*, which answered to our set off (81); and *confusio*, when the obligation of the debtor and right of the creditor united in the same person.

I shall conclude with one or two general rules applicable to all contracts.

All parts of the contract ought to be explained the one by the other, and regard had to the preamble of it (82).

The intention ought to be followed rather than the words, and senseless words were to be rejected (83).

The interpretation of the contract ought to lean in favour of the obligor (84).

In all contracts, where no day of performance is added, the performance ought to be immediately (85).

(81) *As with us*, the debts set off must have been of the same kind, or due in the same right; and set offs could be only in contracts, not in torts.

(82) D. 46. 1. 134. 1.

(83) D. 50. 17. 32 & 92. and 73. 3.

(84) D. 45. 1. 38. 18. (85) D. 50. 17. 4.

He that is to pay, or deliver, is in no delay till after the last moment of the term appointed (86).

Contracts are to be adjudged according to the law of the place where the contracts were made (87).

I have now completed my intention of giving a cursory view of the civil law, as treating of the rights of persons and of things. In the next book I shall proceed to consider public and pri-

(86) Inst. 3. 16. 2.

(87) This rule is not *directly* taken from the Roman law, which, it has been justly said, enjoying universal empire, had no occasion to provide for the case, but it has been extracted collaterally from that system by great and ingenious writers, and particularly by Huberus, who is above all others on this subject to be recommended to the reader's perusal, and not merely to the theoretic reader, but to the man actually engaged in practice. In a mercantile nation, cases governed by this rule must daily occur.

To this general rule there are some exceptions :

First. If the parties in making the contract regarded the law of another country.

Secondly. According to Huberus and others, if it violates the rights of persons not parties to it ; as the marriage of a minor abroad, with a view of avoiding a statute at home.

Thirdly. It does not apply to immoveable property.

Contracts in which aliens are concerned, are between alien and citizen, or between two aliens, and may have been made here or abroad ; in all such cases, I conceive, the cause of action being transitory, suit may be brought abroad or here.

vate wrongs, and their remedies. Before I conclude, let me again remind the reader of what has been said in the preface, that my object has not been to give a full and minute knowledge of the civil law, but to select the most useful and prominent parts, and to comprize them within a moderate compass, proportionate to the inferior importance of this study, in the present day, to that of the common law, in the common law forum. If deeper knowledge be desired, the books and titles of the civil law, containing the material information relative to each subject, have been mentioned and pointed out, each in its proper place.

Though I admit that the importance of information in the civil law to the common lawyer is comparatively small, I must ever insist that its utility to the lawyer, as well as the advocate, is positively great. The civil law, (says an eminent author) as a system of jurisprudence framed by wise men, and approved by the experience of many ages, must, in every age and every country, furnish principles which, modified and applied as the altered circumstances of the times may require, will greatly contribute to the real interests and advantages of society; and though in courting praises to its civil provisions, I have been willing to sacrifice the character of its criminal code, we are in justice required to attend to those palliatives, which it every where introduces to soften its arbitrary maxims, and when it glori-

ously exclaims, “ *Licet lex Imperii solennibus*
“ *juris imperatorem solverit, nihil tamen tam*
“ *proprium Imperii est quam legibus vivere* (88),”
we must admit, that its practice mellowed its
theory, and that its language reprobated the
abuse of its principle.

(88) Code, lib. 6. tit. 23. 3.

ON WRONGS AND THEIR REMEDIES.

The reader must ever be reminded, that this short, but I hope careful selection and abridgment, professes only to convey to the common lawyer the general outline of the civil law, and not to insert any thing superfluous, or to the present day uninteresting. It follows, that the Roman criminal law cannot take up long consideration.

De publicis judiciis summo digito et quasi per indicem tetigimus; diligentior eorum scientia ex latioribus pandectarum libris adventura est.

Conclusio Institutorum.

ON THE CIVIL LAW.

BOOK III.

ON WRONGS AND THEIR REMEDIES

CHAPTER I.

ON PRIVATE WRONGS.

THE clear method pursued by the framers of the civil law, is not least conspicuous in treating of private wrongs. Yet here the reader must not be surprized to find many things treated of and considered as private wrongs, and the subjects of civil actions, which we have been accustomed to consider only in a criminal light. Thus theft and robbery, though they did not in the latter times of the empire pass with impunity from the hand of public justice, were for a long time considered as matters not immediately relating to the public, and to be compensated by private

reparation (1). And even after they became the objects of criminal law, a civil action still remained in the power of the injured party. Under the general name however of theft, were included many deeds, which with us would not bear the name, but would rather be called *conversions*, and the subjects of an action of *trover*.

We will therefore (reserving the criminal view of wrongs for the next chapter) consider now the division of private wrongs made by the Institutes, together with the satisfaction to be made for each of them respectively to the offended party.

(1) At first at Rome, by the twelve tables, theft was punished criminally. Afterwards, during many ages, it was not punished criminally; in Justinian's time it was, but not capitally. Draco punished it capitally—The Jewish laws, and Solon pecuniarily.

It has been doubted by able men, and is a question for humanity and sound policy, whether theft, or even robbery, unaccompanied with death or wound, ought to be punishable with death. I will not with Sir W. Blackstone say, (for which he has been warmly censured by Dr. Christian), that theft is only a violation of social rights, and not of natural; but it is my humble opinion, that to punish it with death, is neither necessary in society, nor agreeable to the will of God; were it not for the pious subterfuges of juries, and the humanity that prevents the law from being literally executed, which seldom is suffered to fall on any but hardened and old offenders, we should shudder at our code; though it must be acknowledged, that later statutes have alleviated the punishment of first offences and smaller thefts.

Obligations, or rights arising to the injured party from the torts or wrongs done by another, were divided into those arising *ex delicto*, and those *quasi ex delicto*—from *torts*, and *quasi torts*; and offences were accordingly partitioned into proper and improper.

Torts or wrongs, *properly* so called, as distinguished from quasi torts, were classed under four heads—*Theft*, *Robbery*, *Damage*, and *Injury*—meaning by the first, abduction or conversion of property without force;—by the second, that attended with force;—by the third, damage done to property without taking away the thing damaged, or deriving benefit to the owner;—by the last, injury to the person or character of a free man.

Theft was defined *contrectatio fraudulosa, lucri faciendi gratia, vel ipsius rei, vel etiam usus ejus, possessionisve*.

THEFT.

Theft was divided into manifest, and not manifest; the first being when the person was actually caught in the fact (2), or was discovered with the property in his hands before he reached his destination; the distinction was important, because the damages or penalty varied, being in the one case fourfold of the property taken, in that of not manifest theft, only double.

(2) Quem Græci *εἰς αὐτοφύκτου* appellant. Inst.

It has been observed, that in many cases, theft answered rather to what we would call conversion, and accordingly the Institutes establish a rule, that every intermeddling with, or using another man's property against the will of the owner, is *furtum* (3).

The action and remedies for theft were reasonably extended to the aiders and abettors, but not to the mere adviser. The son and the slave, if they committed depredation on the property of those in whose power they were, committed theft, but not remediable by action, since no action could lie between the parties: and yet it was so far theft, that as in all other cases of *furtum*, if the property thus by them taken was handed over to another, the new possessor could make no title to it by prescription, nor could any possessor *malæ fidei*, support an action for the thing or its value.

The *actio furti* was given to the person having an interest, although not the absolute proprietor, as to the pawnee, who, as the Institutes observe, might rather choose to bring such an action of trover for the *thing*, than to proceed merely

(3) Inst. lib. 4. tit. 4. *Furtum autem est non solum cum quis interceptiendi causa rem alienam amovet; sed generaliter cum quis alienam rem invito domino contrectat. Itaque siue creditor pignore, siue is apud quem res deposita est, ea re utatur—siue is qui rem utendam acceperit, in alium usum eam transferat, quam cujus gratia ei data est, furtum committit.*

against the *person*; and thus the taylor or the dyer, who mislaid the goods committed to his care, could maintain this action, and not the owner, whose remedy lay over against his tradesman by an *actio locati* (4).

A buyer had not this action before delivery, so that previous possession seems to have been necessary to maintain this action.

If there were divers persons concerned, they all were liable but to one and the same pecuniary penalty amongst them; yet any one of them might be sued for the whole, which discharged the rest *civiliter* (5).

The *actio furti* did not lie against the heir of the wrong doer, as being a penal action *ex malificio* (6).

(4) It differed therefore from our action of trover, in which property is necessary in the plaintiff; and from our action of detinue, inasmuch as the thing itself could not be recovered, but damages for the loss of it; if the thing itself was to be recovered, the proprietor brought an action *vindicando* against the possessor; if the possession had passed to another, then against the original wrong doer *condicendo*. *Rei enim furtivæ persecutio soli domino competit, sive de rei vindicatione queritur, sive de conditione furtiva.*

(5) On a similar principle, by our law, torts may be separated, but not contracts.

(6) Thus with us, wherever the cause of action is really a *delictum*, it doth not survive against the executor. Where it is not so, some action survives, but not such an one as in its form of pleading sounds to be *ex delicto*, vid. Hambly and Trott. Cowper, 375.

OF RAPINE, OR ROBBERY.

This tort is here also considered for the present merely in a civil light, and is distinguished from simple theft by the essential concomitant of force : it could be only of things moveable, and the offence included in its definition malice of mind and wicked intention, and therefore could not extend to the mistaken claimant of his supposed property.

If, however, a man took by force his real or imaginary property he did not go unpunished, for in the first case he forfeited the goods, in the latter was subject to damages in double the value ; for force was by the law abhorred (7).

The remedy for this violent detraction was originally by the *actio furti* : but the prætors added two special remedies by the action *de vi bonorum raptorum*, and *damni illati*, in the former of which the plaintiff sued for fourfold damages, in the latter for double.

These actions, like the *actio furti*, were maintainable by any person having an interest, without absolute property, as by a mortgagee, or an usufructuary ; and altogether the same principles

(7) Thus ours, and all wise laws, generally prohibit force to the injured, and directed him to appeal to justice, to avoid the numberless evils which must ensue from what is vulgarly called taking the law into a man's own hands, with all the passionate fruits arising from such heated intervention

which directed who could bring the first-mentioned action, governed this also.

OF DAMAGE.

By injury, the Roman law meant offence against the person. By damage, against the property or estate, whether that consisted in lands, goods, or any other property. In this general acceptation, it includes both theft and robbery, but is more particularly applied to the destroying, spoiling, or deterioration of the thing, without actually taking it away, or deriving advantage to the offender.

Faultiness, or injustice, were included in the idea of damage; thus the accidental wound inflicted on a slave by the shooter of an arrow, or the rider of a runaway horse, gave no action to the master, if the former event happened in a place usually devoted to such exercises, or the latter did not arise from want of skill (8); but the foldier who shot his dart, in an unaccustomed spot, the unskilful rider who mounted an unmanageable horse, or the unskilful physician (9) who attempted the cure of a domestic, were justly answerable for the consequences to the owner of an injured slave, who might not only

(8) Killing at a tournament was not *damnum*.

(9) Plinius alicubi scribit, soli medico hominem occidere impune esse.

bring his civil action, but also prosecute criminally (10).

The special remedies for damage done were given by the Aquilian law, which in its first chapter ordained, that he who injuriously killed the bondman or cattle of another, should pay the lord or owner for damage so much money as had been made from their service during the year preceding; and by its third (11), provided remedies for damage done also to inanimate things.

The action being of a penal nature, the value of the thing damaged was taken at its highest rate at any period of the year preceding, and every incident was taken into consideration, as if one out of a well-matched pair of horses was killed, the injured party was to be additionally recompensed in damages for the diminution in the others value; and on the same principle the action could not be maintained against the heir of him who did the damage, unless such heir was enriched by the damage.

Though the damage was not done by a person,

(10) We may here see plainly the Roman distinction between damage and injury. The freeman wounded had not a *direct* action from thence, because a man could not say that his estate was *directly* diminished by such wound, but by equity and interpretation of law he might be relieved for the loss of his time, and the charge of his cure, for by these means his *estate* has been impaired.

(11) The second, when the Institutes were published, had fallen into disuse.

but by a thing, e. g. a slave or a quadruped (12), the owner of that thing was liable in damages; and if more persons than one were concerned in its perpetration, so penal was the action, that each appears to have been liable by law to pay the whole recompence, and payment by one did not discharge his companion (13).

We have hitherto spoken of damage done, but it may be also necessary to provide against damage feared from a thing to be done, or such as is apprehended from a thing now done, or from a work actually erected.

The former inlet to wrong was guarded by an edict of the Prætor, called *Nunciatio novi operis*; —the latter by an action de *damno infecto*, or where all other remedies failed, by prætorian aid, and a remedy in equity, filed an interdict, which may be justly translated an *injunction*; but these things are more properly placed under the head of improper offences, or *quasi torts*.

OF INJURY.

Injury, when used in a specific sense by the Roman law, includes the idea of contumely, and

(12) The action was in this case called by the quaint name of the action *si quadrupes pauperiem fecerit*; for pauperies was here defined *damnum sine injuria facientis datum*.

(13) See Dig. 9. 2. 11. 2. From another passage in the Pandects, it should seem, that this action would lie against a judge or magistrate acting against law and justice. See Dig. 9. 2. 29.

might be committed by deed, as assault or battery; or by word or writing defamatory and libellous.

Injuries by deed were distinguished into such as were atrocious, and such as were not.

Atrocious injuries were so deemed from the degree of the violence, as the wound, mayhem, or assault, were more or less desperate—from the *locus in quo*, as if done in the forum, the theatre, or in the presence of the court,—or in respect to the person as committed on a senator, a magistrate, or a patron. These circumstances it was necessary to point out in the libel, and also to state that no reconciliation or remission had subsequently taken place, which would put an end to all penal actions, though not to those of mere reparation.

An action might be brought not only for an injury done to the plaintiff himself, but also to those under his power, as his daughter or wife. With respect to his slave, indeed, the action did not lay, if he had been merely affronted, or even contumeliously struck; the assault must have been atrocious. The free servant must sue in his own name (14).

The legal remedy for an injury to a married daughter might be sought not only by her father, but by herself and her husband; the wife was not allowed to sue for wrongs committed on her

(14) This is almost the only mention I have met of free menial servants at Rome. Inst. lib. 4. tit. 4.

confort. Even the attempt to solicit the chastity of a modest and virtuous woman, was the subject of an action.

The twelve tables for a limb broken or disfigured, established the rude law of retaliation—and for smaller injuries fixed small pecuniary mulcts, agreeable to the barbarous simplicity of the times.

Greater civilization introduced decrees for damages really proportioned to the degree of the injury, to be estimated in the first instance by the feeling of the party, whose resentments were moderated by the final discretion of the prætor. And the Cornelian law introduced a particular form of action, in the cases of assault, battery, or forcible entry.

Julia

In considering verbal injuries, the law was not inattentive to the discrimination of what words should be deemed actionable, and what not. To call a man traitor, usurer, forger, bastard, bankrupt, was particularly penal—and without entering into a tiresome and useless detail, I shall only observe, that affected or ironical compliment was not permitted to screen the defamer (15).

But upon injuries by writing, or libels, the civil law is most particularly severe.

The person who framed—who wrote down,—who read to others or published, or who advisedly

(15) E. G. Tu es bonus homo, which at Rome conveyed the hidden meaning of Cornutus.

bought or sold an infamous libel, was subject to the penalties of the law.

These penalties were, if the injured party proceeded civiliter, besides damages, incapacity of testation, so that the libeller could neither be a witness nor make a will; if he proceeded criminaliter, the punishment or conviction was death; and such was the severity of the law, that it extended its vengeance not only to the framer, but to him who omitted to destroy it when it was in his power (16).

QUASI TORTS.

Of improper offences, trespasses, or *quasi delicta*, which might be committed without malice or ill design, the first enumerated is one unknown to us, the judicial pronunciation of an erroneous sentence (17). If the judge pronounced a wrong

(16) Code 9. 36. This however must be understood to mean only in the case of very desperate libels indeed, and I apprehend only took place when the libel charged the abused with a capital offence. Nor was this the law in any case during the Augustine age and more polished times of Rome, but only in the early æra of the rising republic, and later periods of the declining empire, the severity of the law being restored by Valentinian.

The same distinction seems to have been made as with us, as to allowing the party to plead the truth of the charge in a civil, but not in a criminal suit.

(17) Bracton, however, says, that before his time, judges had made the suit their own by giving an erroneous judgment.

judgment from corrupt motives, he was rendered infamous, and condemned in the whole value of the suit with costs, superadded to a fine adequate to triple his inducement, if he had received a bribe. If the sentence had been in a criminal case, banishment and confiscation was his lot. But we speak at present of error through unskilfulness, without corrupt motive or intention. In such an instance, the judge was said *litem suam facere*, i. e. he was now considered as party to the action, and liable to the payment of what the injured fuitor ought to have recovered, a punishment deemed to be just, since he ought not to have taken an office for which he should have been conscious he was unqualified through want of scientific knowledge;—but as he acted without fraud or design, it was not a *direct tort* or *proper offence*, but only an indirect *fault* and *quasi delictum*. These regulations, in future ages, gave way to the more obvious and rational method of correcting the errors of an inferior, by appeal to a superior tribunal.

The next kind of trespass which the civil law specially dwells upon, is the careless throwing or pouring down, (though without mischievous design) of any thing whereby damage is occasioned to the person, goods, or clothes; and here it is minute in ascertaining whether the owner of the house, or his tenant inhabiting therein, or the occasional sojourner, or the immediate agent, where many dwell in the same house, shall be

liable to the penalty recoverable for the negligent precipitation of the instrument of mischief. This penalty, if damage was done only to the property, was double the estimate of the damage done. If the person was injured, the penalty of accidental homicide was ascertained by law at fifty *aurei*, that of wounding was left to the discretion of the judices; but the law was extremely liberal in valuing the lost time and labour of the man who was thus perpetually rendered unable to work, since it estimated his life at an hundred years, the utmost extent of probability.

The Institutes next consider a subject to us very familiar, and the foundation of many an action. The want of care in persons employed by the owner or master of a ship,—or the keeper of an inn, as to the goods and property committed to the charge of their employers. The master not having entered into any direct contract, an action *ex contractu* did not lie against him, and not having been himself immediately and personally in fault, an action of *tort*, or *ex maleficio*, could not be supported, and he therefore was proceeded against as guilty of a *quasi tort*, and being liable *quasi ex maleficio*.

Though no one could be compelled to keep a house of entertainment, yet the host who professed to keep a public house for travellers was obliged to receive all guests that came, provided he had room. If the guest delivered his box or casket to the innkeeper closed and sealed, or

locked up, without mentioning the contents, and afterwards complained of spoliation, if the box was returned to him in the same state, without any appearance upon it to induce suspicion of fraud, his oath could not be admitted as to the contents, as it might if it was restored broken or unlocked; but he seems to have been allowed to prove the contents by the testimony of others, and so to render the innkeeper liable. And in general, if any theft was committed in a ship, inn, or stable, the owner or master was liable, and the guest had his choice of one of three actions.

The first was a prætorian action for double damage, where the crew of the ship, or the servants of the inn, had stolen the goods (18). The second an action of theft, which extended to the case of its being committed even by a stranger; the third was called an action *de recepto*, which was not viewed in the light of a penal action, and was to recover only simple damages, and therefore extended even to the heir of the spoiler. The party, besides these special actions, might also have a general action *ex deposito*—but then in this general action, the party was only answerable for fraud or gross neg-

(18) In potestate sit ejus cui res subrepta sit utrum mallet cum exercitore honorario jure, an cum fure jure civili experiri. Dig. 47. 5.

ligence, whereas in a special action he was accountable for the slightest fault (19).

Quasi torts, being of infinite variety, to enumerate them all is impossible, and therefore the civil law merely dwells upon some of those most prominent, as to which I believe its decisions will be found nearly analogous to ours.

(19) For these distinctions, see the chapter on Contracts above.

CHAPTER II.

OF PUBLIC WRONGS.

THE light in which crimes have appeared to different legislators, and the punishments by various judicatures thought meet and proportioned to the degrees of offences, are instructive to the senate, and interesting to the people. The provisions of Rome, in its more enlightened and moderate times, may perhaps appear more reasonable and less sanguinary than our own (1).

Offences against God and religion are particularly the subject of the 77th Nov. whose title is

(1) In the progress of the republic, the penal laws softened in their rigour—with us the converse seems to have been the case, by the perpetual accretion of new statutes taking away the benefits of clergy. In matters of private concern, the humanity of judges and juries makes the severity of the laws less felt; but in matters of state, what a horrid picture of cruelty and injustice, of corrupt and time-serving judges, the ermined instruments of legal murder, do the state trials of the last and its preceding century exhibit!

ut non luxurientur homines contra naturam neque blasphemetur in Deum, and it provides that hardened and obdurate offenders shall be punished with death, and enjoins attention to its mandates, by the strictest injunctions to the magistrates under pain of the Divine displeasure, and, in this world, of the Imperial indignation.

Apostacy from Christianity to Judaism, Paganism, or other false religion, was punished by Constantius with confiscation of goods; and if the apostate endeavoured to pervert others, the emperors Theodosius and Valentinian added capital punishment. And heresy was often the prelude to death, as in the instance of the Manicheans under Theodosius and Justinian (2).

Though blasphemy, as we have observed, was so severely punished, common cursing and swearing seems to have been left to the tribunal of Heaven, for, saith the Code, 4. 1. 2. *Jurisjurandi contempta religio satis Deum ultorem habet*, meaning the offence of common swearing in common conversation, and not deliberate perjury as to a specific fact, which seems to have been punishable, even though committed out of a court of justice (3).

(2) We have before observed some legal incapacities of heretics, such as the incapacity of testation.

(3) See Dig. 12. 2. 13. 6. *Si quis Juraverit dare se non oportere, & perjeraverit, fustibus cum castigandum rescribit Imperator.*

The absurd charge of witchcraft, to the reproach of human reason, was listened to by the civil, as by most other laws. The wizard and his consulter were both punishable with death, but the laughable wisdom of Constantine was inclined to compromise the matter, and to allow magic if exerted for a good purpose.

Of acts of toleration, or of penal statutes for deviations in discipline or ceremonies, little or nothing is said, though any affront to the established religious ceremonies of the state was avenged, like any other breach of order. But indeed the penal statutes form so small a part of the Code and Pandects, that detail cannot be looked for, and from the same cause we are at a loss to trace the particular provisions against drunkenness, frequenting of brothels, and such like offences.

It seems, indeed, that for licenced fornication, the civil law assigned no punishment, and a woman was allowed openly to follow the profession of an harlot, after having obtained a licence for it from the grave Ædiles, the miserable trade being thought a sufficient punishment for itself (4). Thus Tacitus says, *Annal. 2. 88. Vitælia, Prætoris familia genita, licentiam stupri apud Ædiles vulgaverat, more inter veteres recepto, qui satis pænarum adversus impudicas in ipsa professione flagitii credcbant.* But if any one presumed to

(4) Heinec, *Antiq. lib. 4. tit. 18.* Something of this kind took place in Holland, as to their *spiel* or dancing-houses.

exercise this trade without leave of the magistrate, they might be fined or driven into banishment. And he who prostituted his wife or daughter for gain, was punishable even with death (5).

The emperors, apparently more anxious to vindicate their own dignity, than to avenge the affronted Majesty of heaven, have been much more prolix in their provisions against treason, than against irreligion. This formidable crime, divided from early times into *perduellio*, or direct acts done against the personal safety of the prince, and *læsa majestas*, whatever was attempted indirectly against the dignity and prerogative of the republic or prince. To attempt the emperor's life is an instance of the first; to pretend to coin the money sanctioned by his stamp and image, of the second. Both were guarded against by a number of successive laws, till they all finally merged in the great statute of treasons, called the *Lex Julia Majestatis*.

This Julian law was twofold, the former introduced by Julius Cæsar, interdicting from fire and water those guilty of treason—the latter the work of Augustus, which pronounced all persons guilty of treason who attempted any thing in violation of the *majestas* or sovereign authority of the state, or of the prince, whether by act or writing, a law which, however severe, was still further aggravated by Tiberius, who extended its

penalties even to words: nay, so outrageous were its provisions, as to include those who shewed any disrespect to the statue or effigies of the prince, even to the ridiculous excess of noticing the giddy profligate who happened to bear into the stew a ring stamped with the Imperial image (6).

The eagerness of tyrants to detect treason occasioned the most extravagant violation of all principles, in the mode of investigating its secret machinations. Persons of the most notoriously infamous characters, and rendered by their infamy (7) legally incompetent to give evidence in any other case, were admitted to prove the highest of crimes. Women, foldiers, slaves, those in a state of pupillage, freedmen, persons of every order and degree, were gladly received as accusers against the unfortunate, and, perhaps, innocent. On every side the sword hung by a thread near the heads of all the subjects of the state, and to use the words of the English parliament in the reign of Henry IV. no man knew how to behave himself for doubt of the pains of treason.

The same dreadful eagerness to protect a government, whose greatest safety should ever be in

(6) If, however, a man accidentally hit the emperor's statue with a stone, or hammer his old bust in repairing it, he is not guilty of treason, say most gravely the Pandects.

(7) Dig. 48. 4. 7. Qui stipendium merebant accusare non poterant. Heineccius, lib. 4. tit. 18.

the goodwill and affection of its subjects, broke through every tender tie of human nature to reach the real or supposed criminal. The son was bound to impeach the father, the wife the husband, the friend the participator of his heart, the obliged his benefactor; for all private relations and domestic affections were to bow before the welfare of the state, or possibly the security of a tyrant.

Yet their law of treasons was, in some instances more indulgent than ours. . . To conspire the death of the queen is treason with us, not so of the empress with them (8). . The wives of traitors did not suffer from their treason, and were capable of retaining their dower (9); and the father, the daughter, and the grandsons, were screened from the forfeitures which affected immediate male descendants.

Railing words against the emperor were, as with us, a high misdemeanor, but not treason (10);

(8) D. 1. 3. 31. I here follow the opinion of Wood, though I do not see how it follows from the authority quoted by him, which is, *Princeps legibus solutus est, Augusta autem legibus soluta non est. Principes tamen eadem illi privilegia tribuunt quæ ipsi habent.* This proves her indeed to be a subject, but so is our queen a subject.

(9) C. 9. 8. 5. 5. With us the wife forfeits her dower for the treason of her husband, but not her jointure.

(10) Every one knows the two old remarkable reprobated instances of capital punishment for words in the reign of Edward IV.

and the same rational principle in both laws directed, that a wish or endeavour to commit treason must amount to some overt act, or be manifested thereby—that the imagination and struggle of the mind must be demonstrated by some open act.

The penalty of treason was the death of the traitor, destruction of his statues and busts (11), confiscation of all his estates, and vacating of all alienations of his property since the commission of his crime. His sons too were rendered incapable of taking by will, or of inheriting by descent from any ancestor or collateral (12).

If the traitor was summoned and would not appear, but absconded at the end of a year from the time of the citation, he was pronounced contumacious, and his estate confiscated (13). And

(11) Statuas detrahendas, D. 48. 19. 24. which Wood translates with a carelessness not quite unusual with him, destruction of his coat of arms, as if the Romans had armorial bearings.

(12) Corruption of blood is generally spoken of as a creature of the feudal system, yet here a species of it appears to have taken place, though not exactly similar to ours.

(13) This then was thought a reasonable exception to that noble sentiment which is breathed by the fifth title of the nineteenth book of the Pandects. "*Absentem in criminibus damnari non debere*, Divus Trajanus, Julio Frontoni rescribit, sed nec de *suspicionibus* debere aliquem damnari, Divus Trajanus Adfiduo Severo rescribit, satius enim esse impunitum relinqui facinus nocentis, (our law says of a thousand) quam innocentem damnari."

even after the death of the criminal, a prosecution might be commenced in order to obtain a decree appropriating his estate to the exchequer and the public funds, that the means which he living would have used to the destruction of the state, might, while he lay torpid in the grave, be applied to its benefit.

From the crime of treason, the eye of the avenging law seems to have turned more immediately, and more earnestly, to that of adultery than any other, and even antecedently to the consideration of the more horrid one of homicide. In early times the horror of an unusual offence, in later the indignation at its frequency, may account for this particular attention.

Adultery was the carnal knowledge of another man's wife (14), knowing her to be so (15); so that a married man who lay with a single woman was not guilty of that crime, but of the crime called *stuprum*, if such single or unmarried woman was not a common prostitute (16).

The punishment of adultery was death to the man, (and this extended to the debaucher of a woman even betrothed to another) to the woman

(14) If committed by a married man with a married woman, the canon laws calls it double adultery.

(15) For without such knowledge it was not legal adultery.

(16) I have so explained *stuprum* from the *Pandects*, vol. 4. chap. 33. Yet in the passage of Tacitus, lately mentioned, it means common prostitution, and Tacitus was a lawyer.

(17) scourging, loss of dower, and confinement in a monastery, with liberty however to the husband to take her out and return her to his bed, if he thought fit, within two years, which if he did not, she was obliged to take the perpetual vows (18).

As the crime was so severely punished by the law, vengeance was not left in the hand of the party (19), except he detected the offender in the

(17) Her freedom from the pains of death for this crime, is ascribed to the self-indulgent part of these ordinances really proceeding from the abandoned empress Theodora, the wife of Justinian, though sanctioned by his name.

(18) The punishment of death, Heineccius insists, was not inflicted in the time of Augustus, of the effect of whose law on this head Horace thus boasts :

Nullis polluitur casta domus stupris, and thinks he knows better than Tribonian, who says it did; and as a proof of it, quotes authorities to shew, that the “*lex julia de adulterio damnatas lege uxores duci vetat, quod perabsurdum foret, si hujus criminis pœna vitam ademisset.*” But this only shews, that the woman was not punished with death, for the law I conceive is not speaking of her marrying the adulterer, but any one else. The words of the Digest on this law are, “*adulterii damnatam si quis uxorem duxerit.*” See Dig. 48. lib. tit. 29. sec. 1.

(19) In Italy and Spain, the husband has been permitted by law to kill the adulterer. Our law doth not authorise such vengeance, however juries may excuse it; all these, and many other provisions, are to be found in the forty-eighth book of the Digests, title 5. which treats of the *lex julia de adulteriis coercendis*, as the fourth title doth of the *lex julia de majestate*. They should be perused by those who wish to know more of the Roman laws of treason and adultery.

act in his own house, and that offender was a person of very low station, degrading trade or profession, or infamous character; this restriction the law declared to be imposed to prevent the unbridled passion of the angry husband from operating without restraint, for it permitted a father to kill the violator of his married daughter's honour, *adulterum cum filia*, which Wood explains to mean, provided he killed his daughter at the same time; the law trusting the father's tenderness, that he would not do so if she was in his power, wherever he detected the offence; and though it did not pardon to the husband the fatal effusions of his wrath under any other circumstances than those above-mentioned, it charged him not with the crime of murder, but subjected him, if of low degree, to perpetual labour; but if of higher rank, to relegation.

The jealousy of the times of Justinian seems to have been proportionable to their profligacy, for he permitted the husband to caution the person he suspected not to keep company or converse with his wife (20), which warning, if disobeyed after being thrice repeated, excused the husband from the penalty of murder if he killed the supposed criminal. And even though the jealousy appeared utterly groundless, the magistrate might punish his persevering obstinacy in thus continuing to give uneasiness to a worthy though absurd man.

The law was much more rational which permitted strong presumption, such as the circumstance of being found in bed together, to supply the place of absolute proof, which in an offence of this stamp, it is almost impossible to obtain (21).

The consideration of this crime may naturally be followed by that of stuprum, (which hath been already more than once defined the living of an unmarried man with an unmarried woman, who lives in reputation) (22), of bigamy, and of incest and unnatural lusts. Stuprum, in persons of rank and situation, was punished with forfeiture of half their goods; meaner persons received corporal punishment with relegation. Sodomy was punished with death; and incest also if in the ascending or descending line; in other cases, with deportation and confiscation. Bigamy was a capital crime; but deflowering a girl not fit for marriage, though with her consent, which by our law is a capital offence if she be under twelve years of age, was by the civil law punished with banishment or condemnation to the mines.

(21) The same I hold to be our law, yet I have known juries give the most extraordinary verdicts from an erroneous notion, that their oaths did not permit them in actions for *crim. con.* to attend to the strongest presumptions, without absolute and almost invincible proof.

(22) This definition found in the Pandects doth not, as I have observed, seem consistent with the use made of the word by Tacitus.

Homicide. The distinctions of different degrees of guilt in the commission of this act, are nearly the same as by our law. Murder—manslaughter (23),—excusable and justifiable homicide. Homicide with deliberation and premeditated design, was punished with death; and the law on this subject which principally claims our attention, is the law enacted by one of the greatest of murderers, L. Sulla, the dictator, and thence usually called the Cornelian law, *de Sicariis*. It comprehended under the name of murder, most of the offences contained in our idea of it, and some, which though in the eye of conscience evidently so appearing, yet by rational and wise politicians, are thought to be perniciously included in its punishment, for instance, perjury, fatal to the life of the accused (24).

(23) I insert the distinction of manslaughter with great hesitation, *in compliance with the opinion of Wood*; for Dr. Christian says, in a note on Blackstone's Commentaries, "In the civil laws, and the laws of Scotland, the distinction doth not exist; and persons tried at the admiralty sessions where the judges proceed according to the rules of the civil law, must either be convicted of murder, or acquitted." Yet this law of Scotland seems to be statute law; see Erskine's Institutes: and the Pandects, lib. 48. tit. 8. 1. say, "*leniendam pœnam ejus qui in rixa causa magis quam voluntate homicidium admisit.*"

(24) With us, the danger of deterring just prosecutions by threatening perjury with death, has outweighed the indignation of the law at this coolest of deliberate murders.

The singular vengeance denounced by the Roman law against parricide, denotes their horror of the crime. The criminal was to be scourged, and then sewed up in a sack with a furious dog, a cock, a viper, and an ape, and thrown into the water, or amidst wild beasts. These animals were chosen as indicative of malice and mischief, or perhaps because they would be more slowly tormenting, and less immediately destructive (25).

Whether manslaughter was distinguished in the manner known to us as to its punishment, or not, there certainly was some attention to the distinction between the effects of deliberate malice, and sudden passion. This might have led in the latter law to absolute acquittal, though the authority I have mentioned in a note says, *leniendam penam*; and in Scotland, according to Erskine's

The Cornelian law, as quoted in the Pandeets, lib. 48. tit. 8. 1. enumerates the following crimes punishable with death. "Si quis hominem occiderit,—aut dolo malo incendium fecerit,—aut hominis occidendi vel furti faciendi causa cum telo ambulaverit,—quive cum publico judicio præesset, operam dedisset ut quis innocens condemnaretur—aut qui hominis necandi causa venenum confecerit—quive falsum testimonium dolo malo dixerit, quo quis rei capitalis damnaretur."

Qui hominem non occidit, sed vulneravit ut occidat, pro homicida habendus.

(25) By the Scotch law, all the posterity of a parricide are incapable of inheriting—even cursing and beating of a parent infers death, if the person guilty be above sixteen years.

Infinites, both are equally considered capital (26).

To the horrid crime of suicide, the Roman Stoic was peculiarly indulgent, and though the law did not countenance it generally, it was tolerated in many instances, and those instances the legislature condescended to point out (27). On duelling it was silent, because the absurd idea had not yet entered the mind of man.

The doctrines and rules respecting excusable and justifiable homicide, nearly, if not entirely, accorded with ours. He who defended himself was not to kill, if he could possibly escape; the person who gave a blow with his fist, was not to be stabbed with a poniard; but if an honourable person was treated ignominiously, as by contumelious beating and scourging, he might defend his honour by the death of his enemy, and the chastity of a woman might be defended at the expence of the aggressor's life. In defence of ones goods killing was not lawful, unless of a thief by night. Casual homicide, if it happened in doing an unlawful act, was punishable, though not capitally.

Theft and robbery come next to be considered, and that in a criminal light, as they were before in a civil.

The punishment of manifest theft was different

(26) Book 4. 6. 19.

(27) Si tædio vitæ vel impatientia doloris, &c. &c. D. 48. 21. 3. 6.

at different times—mulcts, whipping, and amputation of the hand; but Justinian ordered that the penalty should be confined to fine and banishment. Succeeding emperors ordained severer punishments—for the first offence, whipping; for the second, stigmatizing on the back; for the third, even death by hanging.

The punishment of robbery was various according to the degree of the offence. Housebreakers were condemned to hard labour (28); and if by night, the burglar, after suffering the bastinado, was usually sentenced to the mines. Highway robbers (to whom, according to Wood, the name of *Latrones* was appropriated) after repeated offences, might be punished with death and hung in chains; and the same punishment might be inflicted on notorious pirates (29).

Circumstances of course aggravated the crime. Sacrilege and manstealing, called *Plagium*, were always punished with death (30); *Abigeei*, the

(28) The civil law here made an absurd distinction, it required that there should be a taking away, and did not consider a delivery of goods through threats and fear as constituting a robbery.

(29) This is not supported by Juvenal:

Conductum latronem, incendia sulphure capta.

Sat. 13. line 145.

The *Latro* there is not a highway robber.

(30) What was the occasion of this offence being so much noticed is not clear, as military kidnapping was then unknown.

drivers away of a certain number of cattle limited by the laws; *Balnearii*, the stealers of clothes from persons bathing (31); and *Saccularii*, cut purses, were more severely punished; and we have already seen that burglary was distinguished from house-breaking in the day. The receiver and harbourer of a thief or criminal, was also punished; but the law so far indulged human weakness, and the natural affections of the heart, as to forgive the children, the parents, the husband or the wife, who concealed or endeavoured to shelter each other.

Crimen falsi. This name included forgery, and every species of fraud and deceit, and therefore, according to its nature and degree, was punished sometimes with deportation, and sometimes with death. If it was a novel species of fraud, which had not peculiarly come under the contemplation of the law, nor acquired an appropriate name, it was ranked under the general head of *Stellionate* (32), and punished according to the discretion of the judge.

Crimen peculatus (33). This meant stealing of

(31) This seemingly trifling regulation will be explained by the recollection, that every Roman of any note bathed once or twice a day. Judge Blackstone remarks these distinctions of the civil law and the reasons of them. Com. vol. 4. ch. 17.

(32) *Stellionate*, so called from *stellio*, a sort of lizard with variety of spots.

(33) So called *a pecore*, from cattle, the first kind of property, or perhaps from the first money being stamped with the image of cattle.

the public money, or cheating in the public accounts. The punishment was death.

Crimen refidui was a misapplication of the public money.

Crimen repetundarum, or bribery. By this was understood the corrupt receiving of money or presents by persons in public offices, and it extended to the medium of wives or servants. Presents of meat and drink however were allowed, and others to the value of 500 *aurei* in any one year, if the donor had not any suit or petition depending before the donee.

Bribery was punished with death, if thereby an innocent man was condemned—with banishment if the guilty was absolved—and the person that gave the bribe was also punishable.

Crimen ambitus was the crime of procuring public office by money or other gift, or by any unlawful mode of canvassing and solicitation; under this name was included also the offence of a suitor visiting and courting a judge while his cause was depending before him (34). At one

(34) From the charge of corruption the judges of these countries have, from time immemorial, been perfectly and deservedly free, with very few exceptions. Even Lord Bacon and Lord Macclesfield had something of custom to plead in their behalf; and the last instance was tinged with party. But it is not enough for a judge to be honest; he has to contend with the passions, the prejudices, the partialities, which, unknown to himself, may unwittingly impose upon him. To become a hermit is too much to

time the officers of the Imperial court avowedly took rewards for the procurement of office, and were allowed to maintain actions to recover such remuneration, but this practice was abolished by Justinian.

Crimen fraudatæ annonæ was the crime of forestalling and monopolizing the market, and was punishable with death.

The crimes hitherto enumerated had each its appropriated punishment. There were others called extraordinary, and punished by the extraordinary power of the judge. Such were threats of death, or bodily hurt,—prevarication, *i. e.* where the informer colluded with the defendant, and made a feigned prosecution.—Removing landmarks,—plundering sepulchres,—breaking down dams,—breaking of prison,—taking unlawful distresses,—women procuring abortion, and latterly the exposing of infants with intention that they should perish,—and under this genus were included vagabonds and sturdy beggars. All such offences were said to be punished arbitrarily, not meaning thereby the wild pleasure of the judge, but his sound discretion.

ask, yet he who mixes in society can scarce avoid to hear the common, though perhaps false fame, of the vicinage.

In France, solicitation of the judges (who purchased their places) was avowed and universal. *Je m'en vais solliciter mon juge*, was a common and curious phrase. Hence, perhaps, the philosopher will trace one great cause of the downfall of the monarchy.

To the black catalogue of crimes and punishments, succeeds the smiling title of mercy, liberation, and pardon. The criminal could not be tried twice for the same offence, even though he confessed the crime subsequently to his acquittal, but he might be prosecuted for the same fact, if it bore two aspects, *diverso intuitu*, as the son who had killed his father, and escaped an accusation of homicide, might yet be tried for parricide, that being a crime of a different nature (35).

One protection of the criminal merits particular attention; that arising from prescription or length of time. For various crimes there were various terms of limitation, but a lapse of twenty years screened the offender from all prosecutions; a regulation which has been imitated by Scotland, and which the civilians insisted was wise, as they reasoned, that limitation in criminal causes was as necessary to quiet the minds of men, as in civil causes to quiet their possessions, that neither property nor life might be uncertain.

We are accustomed to boast of our *Habeas Corpus Act*, as the great glory of English freedom (36); but Rome, though not equally favoured by the genius of liberty, was not altogether without a

(35) So with us, a man acquitted of felony may be indicted for a trespass in the same fact: a man indicted under a statute, may be found guilty at common law.

(36) And so it is in peaceable times, but unfortunately it is always suspended in the only times when any great number of persons can want its aid, in times of trouble.

provision of this nature, such as that if a person accused was not brought to trial within two years, he was to be discharged from the accusation.

The power of pardoning, crowns the munificent beams which issued from the merciful side of the Roman tribunal. That power which, as Montesquieu observes, the principle of despotic governments doth not admit, but which, exercised with prudence, produces admirable effects.

CHAPTER III.

OF THE ROMAN COURTS AND ACTIONS. *

for forums of Atrium in action 2. p. 32

THE nature of the Roman tribunals, during the time of the Republic, is wrapt in much obscurity, and hath given rise to much controversy. The ambiguous name of Judices, together with the modern application of it, had produced an erroneous opinion, that the persons so called corresponded to our judges. This opinion (1) hath been sufficiently refuted, and it has been proved (2), that they much more resembled the modern jury, and that there presided in the court a distinct magistrate, who pronounced the verdict or sentence of the judices or jury.

(1) Neither Dr. Middleton, nor Abp. Potter, seem to have been aware of the distinction here mentioned, between the judices or jury, and the magistrates or presidents in the courts of judicature, or judges of the bench. Dr. Middleton, in his life of Cicero, calls the judices, judges of the bench.

(2) Particularly by Mr. Pettingal, in a treatise expressly written to shew the antiquity of juries, and their resemblance to the Greek Δικασται and Roman judices.

** In criminal matters judge 2. p. 388.*

A great question has been started, and some deductions made from it applicable to celebrated controversies in our own times, whether these judices were judges of law as well as of fact. During the Roman republic, says Dr. Halifax, the office of magistrate and judge were distinct and separate. The office of the magistrate was to enquire into matters of LAW, and whatever business was transacted before him, was said to be done *in jure*. The office of a judge was to enquire into matters of *fact*; and whatever was transacted before him was said to be done *in judicio* (3). On the other hand Dr. Pettingal maintains, by many elaborate arguments and ingenious quotations, that they were judges both of law and of fact, and that the presiding magistrate, sometimes called *Judex Quæstionis*, had little to do but preserve decorum in the court, to collect the opinions, and pronounce a sentence conformable to the sentence of the jury.

But a question much more curious, and which I do not recollect to have seen agitated, occurs, and that is, how were either the judices, or the magistrate, capable of determining on matters of law. To begin with criminal cases; the judices for all trials in criminal cases, were chosen by ballot on the kalends of January, the prætor

(3) Halifax Analysis—Book 3. ch. 8. Of the same opinion seems to have been the great Montesquieu.

taking the ballot (4), and then, (5), out of this whole number was struck the jury for each particular cause, amounting in number to eighty-one, but rendered, by a power vested in each party, to challenge or reject fifteen to fifty-one.

The bodies or orders of which the select judices for the year were taken by ballot, varied at different times, and of so great consequence was that point to liberty, that the controversies concerning it gave rise to almost all the interior troubles in the Roman state from the time of the Gracchi to the death of Julius Cæsar, the great contention between the higher and lower orders being, who should be masters of the judices or jury, or out of what orders they should be chosen, and one great cause of the odium against those illustrious men, the Gracchi (6), and of their fatal end, was the transferring the choice of the

(4) This is the account generally given, yet the prætor seems to have had some further authority from this passage of Cicero. *Prætores urbani, qui jurati debent "optimum "quemque in selectos judices referre,"* unless, as is most probable, this barely refers to his returning a general list, out for which the juries for the year were to be taken by ballot.

(5) This very much resembles our method of striking a record jury, under the act of parliament, previous to the assizes for all civil causes during the same.

(6) "*Duos Clarissimos, ingeniosissimos, amantissimos plebis "Romanæ viros. Non ut plerique nefas esse arbitror Gracchos laudare.*"

judices or jury, from the senators to the equites, who were a middle order of citizens.

At a subsequent period they were chosen half out of the senators, and half out of the equites (7) — (*7), then again out of the equites only (8) — then again divided (9), and at last by the Plautian law, chosen out of the three orders, the plebeians being added to the former two.

The senate and aristocracy being friends of Sylla, and the equites having been partizans of Marius, the former made a law that the judices should be chosen out of the senators only. But this regulation lasted but ten years, when they were appointed to be chosen out of three orders (10), the senators, equites, and tribuni

“ Gracchi qui Plebi Romanæ commodis plurimum co-
gitaverunt.”

Cicero de lege Agraria.

(7) By a law of Servilius Cæpio.

(*7) By the lex Glaucia.

(8) By the lex Livia.

(9) Equester ordo judicavit quinquaginta annos sine infamia secundum æquum & bonum, is the universal testimony of antiquity—ne tenuissima suspicio, says Cicero,—Quæ intra decem annos postea quam ad senatum judicia translata sunt nefarie flagiose que facta sunt.

(10) The tribuni ærarii were not, as the name might seem to import, quæstors or treasurers of the army, but representatives of the very lowest orders;

ærarii, and thus they appear to have been at the trial of Milo (11).

But in all these modes of appointment, there is no reason to suppose that the judices or jury thus chosen, were well if at all qualified to judge of matters of law, or versed in legal science.

And though I have been hitherto speaking of criminal cases, we shall see little reason to expect more legal knowledge in those of a civil nature.

The juries, or if that name be not approved, the assistance of the prætor, were, according to Kennett (12), of three sorts, Arbitri, who were appointed to determine in some private causes of no great consequence, and of very easy decision; Recuperatores, assigned to decide controversies about receiving or recovering things which had been lost or taken away; and Centumviri, who tried causes of a superior order.

I think he has omitted an order of inferior judices between the Recuperatores and the Centumviri; or, in other words, that all the trials above the cognizance of the Arbitri and Recuperatores,

(11) The votes on Milo's trial stood thus:

Condemned by		Acquitted by	
Senators	12	Senators	6
Equites	13	Equites	4
Trib. Ær.	13	Trib. Ær.	3
<hr/>		<hr/>	
38		13	Total 51
30 challenged make 81.			

(12) Roman Ant. tit. book 3. ch. 171

were not *centumviralia judicia* (13). Heineccius particularly observes, that the *judices selecti* did sometimes determine private causes, and proves it from a passage out of Suetonius. But it matters not to our present question. Certain it is, that the most important civil causes, and those which required most knowledge and judgment, were reserved for the Centumviri. Now who were they? one hundred and fifty men, (for the number did not answer exactly to the name) annually chosen, three out of every tribe, to decide private controversies. What reason is there to suppose that they were much greater lawyers, though they might be more respectable jurymen than their fellows?

We must then look to the presiding magistrate, the real judge, not called *judex* indeed, but yet really and truly corresponding to the judge on the bench, and not to the jurymen, to give his aid and direction in point of law.

This presiding magistrate was properly the prætor (14); but as the prætors, though their

(13) *Centumviralia judicia sunt, usu capionum, tutelarum, gentilitatum, mancipiorum, parietum, lupium, testamentorum ruptorum, aliorum que hujus generis. Cic. de Or. c. 1. 38.* These Centumviri were divided into chambers, like the Roman rota in modern days, for trying each its own particular species of causes.

Judex Pedaneus was so called, because in *subsellis* & quasi ad pedes prætoris sedebat.

(14) The people at some periods might choose judges in criminal cases distinct from the prætor, called *Quæstiores Paracidii*.

number was latterly encreased, could not possibly preside at all trials, they appointed deputies both in civil and criminal cases, viz. in the former the *decemviri litibus judicandis*, and in the latter a *judex quaestionis* (15). The *decemviri* were chosen out of those who had been *quaestors*; the *judex quaestionis*, out of those who had borne the *ædileship*; but as we can see no reason why the *quaestorship* or *ædileship* should require or give a general knowledge of law, and as the *prætorship* being annual, his deputies must have been also, the difficulty is not much removed.

The only way which occurs to me of accounting for the possibility of the existence of the judicial power, without standing judges learned and experienced, is by supposing, that in a military state, little acquainted with commerce, few laws and simple controversies required no great knowledge to decide them, and that the decisions were often like those of the Turkish *cadi*, if honest, governed chiefly by the good sense of the individual; a supposition rendered more probable when we reflect, that in the earlier times of Rome, every *prætor* made his own code, and published at his entrance into office the rules, regulations, and maxims of justice, which

(15) At Milo's trial it happened, from the particular time of the year, that there were no magistrates elected, and Pompey vested for the occasion with extraordinary power, himself appointed the *judex quaestionis* for that cause.

appeared to him proper to be followed in the ensuing year, until in more improved times he was obliged to attend to precedent, and the *Jus Prætorium* became a permanent Code.

In the times of the Emperors, we find these *judices selecti*, gradually going into disuse,—the power and authority of juries neglected and despised, and gradually all judicial authority vested in the magistrate or judge of the bench alone, and these magistrates ultimately becoming permanent like our own tribunals, as will appear from the following extracts from a passage in the *Novellæ*, 82. 1. “*Vetus schema Zenonis omnino perimimus—eligere vero per-speximus—qui communes omnium erunt Judices;*” and a little after it says, “*Quia vero competens est esse etiam majores aliquos dignitate provectos, experimento causarum unutarum aut plurimi temporis exercitatoſq. ideo perspeximus,*” &c. (16). *Judex* here plainly signifying judge of the bench, for it is said in the next chapter, “*Judices itaque post nostros administratores hos esse volumus, & his negotia deligamus.*”

It was a principle of the Roman law, in determining who should be the *judex*, or what the

(16) Before the age of Justinian, or perhaps of Dioclesian, the decuries of Roman *judges* had sunk to an empty title, and in each tribunal the civil or criminal jurisdiction was administered by a single magistrate, who was raised or disgraced at the will of the Emperor. GIBBON.

court of decision, that *actor sequitur forum rei*, a principle eagerly adopted by the canonists to exempt ecclesiastics from lay jurisdiction, but not imitated in the European courts of admiralty, which seize the goods of a foreign debtor if found in the creditor's country, and bring the cause to the creditor's tribunal; but in Friseland, says Huberus, which is particularly tenacious of the civil law, this practice doth not prevail.

Trials were either more or less solemn, the former *pro tribunali*, the latter *stiled de plano*, being decided by the hasty signature of the prætor at his own house, or in the public way without any formal decree, upon mere petition (17). In the more formal trials, the party proceeded by regular forms of action according to the nature of his case, which calls upon us to give a general view of the Roman actions.

They were divided in the first place into real, personal and mixed. *Real* actions, otherwise called vindications, were those in which a man demanded some certain thing that was *his own*; and were founded on dominion or *jus in re*. Personal actions, denominated also *con-*

(17) It is a great mistake to think that causes heard *de plano* included all summary proceedings. Some of those *pro tribunali* were also summary, so that *de plano* and *summatim* are not synonymous. It is a mistake also to suppose that no summary proceeding was in writing. *Actor eligit in causa summaria an velit petere scriptis vel verbo.* Rep. Berta. Chini. 36.

dictiones, were those, in which a man demanded what was barely *due* to him, and were founded on obligation, or *jus ad rem*. Mixt actions were those in which some specific thing was demanded, and also some personal obligation was claimed to be performed (18).

Actio realis dicta est ex re, quæ petitur ; puta quando quis nullo jure mihi obligatus est, sed volo illi quæstionem super aliqua re movere. *Personalis* dicitur quando persona obligata est ; puta, cum ago contra eum, qui mihi in aliquo contractu vel maleficio, vel quasi, obligatus est. Sed certe secundum hoc videtur quælibet actio realis & personalis ; nam si peto rem, per consequens dico te obligatum ad rem ipsam tradendam seu restituendam, & sic habet locum realis & personalis. Item si peto a te decem ex causa mutui, dirigo actionem meam in ipsa decem ; & sic habet locum realis & personalis. Considerandum est autem ex quo fonte prima procedit actio, et secundum initium et originem facti censenda est personalis aut realis. Nam in contractu vel quasi, maleficio vel quasi, *persona principaliter* obligatur : & ideo tantum actio personalis locum habet. Cum vero agit ad rem, *res* tantum *principaliter* petitur.

(18) I have taken this first paragraph from Halifax, because it is impossible to express the distinctions more clearly or better.

Real actions with us have a more limited meaning, as confined to *real* estate, a distinction of property unknown to the Romans.

Scias quod in nulla reali actione debet quis dicere, peto mihi rem restitui, sed tantum peto rem ipsam vel hæreditatem. Lib. 2. Speculi de Actione.

Real actions were either *civil* or *prætorian*. The former were *rei vindicatio*, properly so called, and the *actio confessoria & negatoria*. The first supposed property in the plaintiff, possession in defendant, and required a previous decision as to the possession *pendente lite* (19). The second and third were intended to be applied to incorporeal things, the first claiming a service in another's estate, the other denying that his own was liable to a service or *servitus*.

Real actions being directly or properly given by the law for the revindication of those things

Prætor

(19) The whole conduct of the action called *rei vindicatio* may be seen in Cicero's Oration for Muræna.

This distinction between the *petitory* and *possessory* suit is worthy of remark by those who wish to investigate the origin of our possessory bills.

The determination of the possession in the intermediate time is often illustrated by the story of Appius and Virginia, who, in flagrant violation of all principles of law, decreed that possession in favour of slavery.

This interlocutory decree, called in the Roman law *lis vindictiarum*, has been usual in our court of admiralty, as shall be shewn hereafter.

The meaning of a *servitus* has been illustrated in a former part of the volume. It may be further exemplified by parishioner's right to bury in the church-yard, though the freehold be in the parson: that is, a *service* from a thing to a person or persons,

The whole conduct of the action called rei vindicatio may be seen in Cicero's Oration for Muræna.

only, in which a man had a vested property or dominion, the prætor was obliged to lend his aid in many cases, for instance, by the *actio publiciana*, if a depositary or trustee lost possession of a thing, (in which in time he would have acquired a property,) before the property accrued.—*Recissoriana*, to guard the rights of persons in an enemy's prison or beyond sea, and rescind prescriptive claims set up in their absence.—*Pauliana*, where a debtor had disposed of any thing to defraud his creditors (20); and *Serviana*, to recover a distress eloigned, actions deriving their names from the various prætors who were the authors of them.

If incident questions arose, which must be determined previously to the main question, they were tried in actions also ranged under the head of real, and termed præjudicial actions, as for instance, whether the plaintiff was a slave or a bastard (21).

The personal actions of the civil law, as Mr. J. Blackstone observes, were of the same nature with ours; they arose from contracts or torts, either legally or equitably. To recount them, seems to me, at this day, an idle and superfluous task, but curiosity may be satisfied by re-

(20) This answers to our statute against fraudulent conveyances.

(21) These may be compared partly to pleas in abatement, partly to issues out of chancery. Bracton speaks of præjudicial actions, lib. 3. cap. 4.

curing to the brief but clear analysis of them made by Bishop Halifax. I will content myself with explaining the names of one or two of them, which even now not unfrequently occur to learned readers.

Conditiones, or conditious actions, took place when new laws introduced new obligations, without prescribing the particular suit or mode of enforcement. The *actio in factum*, or *præscriptis verbis*, which may properly be construed an action on the case, has already been explained (22).

Restitutio in integrum was to rescind the contracts of minors, or such as had been made through force or fear. *Ex mutuo—commodato, deposito, locati conducti—empti venditi.*—*Pignoratitia* explain themselves by the names of the contracts from whence they sprung, and in many of these cases there was not only a direct, but a contrary action, that is, the defendant had his action. E. G. the depositary against the depositor, to indemnify him for any expences incurred.

Of mixt actions the most remarkable men-

(22) As applied to *innominate* contracts. See Chap. II. *Præscriptis a Jureconsultis quum nullæ formulæ darentur a Pontificibus vel prætoribus*. If it were worth the time many resemblances might be shewn between conditious actions and some of ours: thus *condictio indebiti*, was *assumpsit* for money paid by mistake.—*Condictio causa data non secuta*, *assumpsit* to recover back money, where the consideration happened to fail.

tioned are the *communi dividundo* and the *finium regundorum*, of partition, and boundaries (23), and they were so, because the prætor might, instead of assigning the land, give if he chose a pecuniary compensation and remedy against the person; but why this was more peculiarly the case in these particular questions about landed property, doth not seem so clear.

The next grand division of actions was into those *bonæ fidei*, *stricti juris*, & *arbitrarias*. In the second instance the court was legally confined to the strict words of the contracts or agreements;—in the first with more latitude could judge what was the real equity of the case;—in the last, if the defendant refused to listen to reason, the judge was allowed to punish his obstinacy by decreeing more than the sum even equitably due. Indeed the actions *bonæ fidei* & *arbitrariæ* seem to have been decided by arbiters, *arbitri*, and not by the *judices*.

Actions were again divided into persecutory of the thing, or penalty, or both. By the first were meant all real actions, and all personal founded in contract; by the second those founded in tort; by the last such in which some thing was recovered, and also a penalty imposed on the defendant, as the action *de vi bonorum raptorum*.

The distinctions of actions into such in

(23) *Familie ereiscundæ* and *Hereditatis aditis*, when a stranger kept possession against the heir, were also mixed actions.

which double, triple, and fourfold damages were recoverable, or in which less than the sum due was recoverable, as for a dividend of a bankrupt's effects, are of less importance. As actions might be founded in contracts entered into not only by the man himself, but also by those under his power, as his son or his slave, this gave rise to another distinction of them, and as such persons might also commit wrongs for which the father or master were answerable, the class of *noval* actions originated from thence.

The distinction of the *actio directa & utilis*, is familiar and plain; the former sprung from the direct words of a law, the latter from its equitable interpretation.

The last distinction I shall mention, is into perpetual or temporary; the former were so called because at first there was no statute of limitation affecting them, though they were afterwards confined to *thirty* years, which seems to have been the longest limit allowed for bringing any action; as to temporary in many cases the limitation was shorter, even down to *three*, and those favouring of a criminal nature were confined indeed to *twenty* at the most. *Prætorian* actions at first must have been brought within a year, but afterwards the time was regulated by analogy with those called *civil*.

The power of *cumulating* actions deserves particular notice; it is unknown to the English law, and even to the Scotch, but is a distinguishing

feature in the practice of our court of admiralty, which so closely follows the civil law, and the principle on which depends the salutary privilege of seamen and others to join in the same suit, the general ground of action being the same, in that court, which advantage is one of the great boasts of that tribunal. It is necessary therefore to know that the Roman or civil law, for the saving of expence, and curtailing of litigation, admitting the junction of several actions depending on one and the same ground, as in imitation of it our courts of equity will allow commoners to join in suit on a question of common, or parishioners to establish a general *modus*.

Calvinus, in his *Lexicon Juridicum*, has from the civil law (particularly the beginning of the pandect, de Jurisdictione omnium Judicum, and the end of the chapter in the Code de Annali Exceptione) abridged the following account of the cumulation of actions. *Cumulatio est jus persequendi multis actionibus, in uno eodemque judicio editis, gratia minuendarum litium semper permixta nisi fuerit nominatim prohibita. Est introducta propter compendium litigandi, scilicet ut apud eundem judicem, eodemque tempore, simul disceptentur ea quæ alioquin multiplicatis sumptibus & molestiis seorsim expedienda forent. tit. Cumulatio.*

*. The method of proceeding in criminal cases was threefold, by inquisition, accusation, and denunciation, names and modes of proceeding

How full term 2 / 388

also familiar to the ecclesiastical courts in modern times.

Inquisition was an act of the judge making enquiry by virtue of his office in general, or upon common fame existing among credible persons, and was either general or particular.

Accusation was a solemn charge of a crime, in order to public punishment, preferred to a judge by a private accuser.

Denunciation was the delation of the charge to a proper tribunal, by persons peculiarly called upon by their offices to enquire into the existence of crimes (24).

I shall here conclude this compendium, which I trust will be an useful, and from the difficulty of compression of such vast materials has certainly been to me a laborious selection of those points which appeared most worthy of notice in modern days. By way of Appendix the Practice of the Ecclesiastical Courts, as is deduced from the Civil Law, is here annexed.

(24) Denunciations, such as presentments of offences, by churchwardens and questmen, are almost out of use with us; the two other modes of proceeding are familiar under the names of the *mere office*, and the *office promoted*. The name of inquisition seems to have gone into disuse, through detestation of the vile use made of it by certain foreign ecclesiastics.

PRACTICE OF THE
ECCLESIASTICAL COURTS.

here there are letters of request.
which may be inserted in the margin
of the text, and which are
of great value.

The reader will in this chapter find some passages in the text, and some notes, which are repeated in the chapter upon Admiralty Practice in the second volume. This was unavoidable, unless important matter were to be omitted in treating of one practice or of the other, or unless the student of one was to be perpetually referred to the other, with much inconvenience.

ON

THE PRACTICE

OF

THE ECCLESIASTICAL COURTS.

HAVING now taken a short survey of the civil law, we shall be better prepared and enabled to understand the practice of the ecclesiastical courts. I shall speak first of the consistorial, then of the prerogative, and lastly of the courts of appeal.

All proceedings in the court of prerogative being summary, to understand practice thoroughly, our first and principal attention should be paid to the consistorial courts, for having once well comprehended the proceedings in a plenary suit, it will be easy to explain those in a summary:

OF THE PRACTICE OF THE CONSISTORIAL COURTS.

Causes in these courts are either plenary or summary. *Plenary* (1) being those in which

(1) Plenary causes, among many others, are all testamentary causes, except in the court of prerogative, those of jactitation, dilapidation, simony, and all causes of correction from the office voluntarily promoted. The causes in Ireland, and those from the mere office, may be examples of summary. Defamation causes may be now heard *summarissime*. See 6 Geo. I. ch. 6. sec. 13.

If in plenary causes, the proceeding be summary, i.e. with-

the order and solemnity of the law are exactly observed, so that if there is the least infringement or omission of that order, the whole proceedings are annulled.—*Summary*, those in which such order is dispensed with. My first business shall be, and it is much the most important, to explain the order of proceeding in plenary causes.

In every plenary cause there are three parts, one from the citation to the contestation of suit inclusively.

The second, from the contestation of suit exclusively to conclusion in the cause inclusively.

The third from conclusion to definitive sentence.

in its former shape

* Under the first division I shall consider,

1. Citation.
2. Contumacy.
3. Appointment of a proctor.
4. The Libel,
5. Exceptions, Replication and Contestation of suit.

Under the second,

- | | |
|-------------------------|----------------------|
| 1. Further allegations. | } with exceptions to |
| 2. Personal answers. | |

out contestation of suit, an assignation and term to propound all things, and to conclude, and without conclusion the whole is nullity; but if in summary causes the proceeding be plenary, it is not invalid. In case of doubt, therefore, it is better to proceed plenarily. See Oughton's *Ordo Judiciorum*, tit. 7.

- Under the third;**
1. Sentence.
2. Execution (2).

CITATION.

(2) I think this the plainest analysis; Oughton makes one somewhat different, and many of the writers on civil law, a third still different from his, viz. *preparatoria judicii*, the preparatives of the cause, which are down to contestation of suit, and *judicium ipsum*, the cause itself, which is from contestation of suit to sentence inclusively, and divide both the preparatories, and the members of the cause itself, into substantial and incident. *Intervention* and *reconvention* will come in with more clearness, after once analysing a simple suit free from those ingredients.

Q G 3

of the promovent—of the impugnant—of the cause of suit—of the place—and of the time of appearance, to which we may add the affixing the seal of the court, and name of the register or his deputy.

In mentioning the defendant, besides the description of him evidently necessary, the 120th Canon (4) ordains that no bishop, or other ecclesiastical judge, shall suffer any general process of *quorum nomina* to be sent out of his court, except the names of all such as are thereby to be cited shall be first expressly entered by the hand of the register or his deputy under the said process, and the said process and names be first subscribed by the judge, or his deputy, and his seal thereto affixed.

The species of persons to be cited is also to be considered. Noblemen are to be cited by letter missive. Minors under twenty-one to be enjoined to appear according to law, that is, by their guardians, (or if they have no guardians, themselves or the persons they reside with are cited), and bodies politic by their syndic lawfully constituted. From a consistorial court, no citation can issue to summon a man out of his diocese (5).

(4) The 69th in Ireland.

(5) By statute; but if he appear, and submits to the suit, no prohibition will be granted.

*prohibet, which
is argued, when
the case is
brought on*

CONTUMACY.

Under the last head we supposed the party cited to pay obedience to the citation. We must now consider the case of his contumacy in not appearing. First, when he has been served with the citation; secondly, when he absconds, or at least cannot be found, to be served with the citation; and, thirdly, I will consider the case of his appearing, and disappearing again.

In the first instance, the primary citation being returned, and oath made of the service thereof, and upon proclamation made the party not appearing, it is prayed, in pain of his contempt, that a citation issue, summoning the party to shew cause why he should not be excommunicated.

This being served on him, and not being obeyed, a citation issues to him or her to *see* or *hear* themselves excommunicated, together with a mandate or authority to some proper person to execute the said citation, the whole of which is usually prayed for by the name of a *videndum ad mandate* (6).

The last mentioned citation being returned, and oath made of the service thereof, and the

(6) If the party once appear, and appoints a proctor who exhibits a proxy, all the trouble on the following page is saved, for this proctor never can disappear in the consistorial court.

mandate being also returned, together with a certificate of the execution thereof, the judge assigns the party to be excommunicated, which however still cannot be done till the end of fourteen days, at the expiration of which time the proctor offers a schedule or decree for excommunication in writing, which the judge at his petition, on that or perhaps the next court day, (7) reads and promulges (8). The party is then to be *denounced* and declared excommunicate in his parish church, by the minister only, in time of divine service upon a Sunday, and the denunciation, with a certificate of the execution thereof, is lodged with the register; and then if the party stands out excommunicate for forty days, to be reckoned not from the excommunication but from the denunciation, application is made to chancery for the writ *de excommunicato capiendo* (9).

After all this tedious process, though the con-

(7) Whether this and other acts shall be done on succeeding court days, or more time be given and allowed, must depend very much on circumstances, and the discretion of the court.

(8) If the judge be a layman, he must call in some proper and discreet clergyman to read the sentence of excommunication in his presence.

(9) The proceedings, if the party stands out excommunication for forty days, with the mode of application to chancery for the writ *de Excomm. Cap.* are found in Burn, title *Excomm.*

This has twice place without excommunication under 2 Barn. 354.

tumacious person is punished, his adversary has made little progress towards the hearing of his cause. He must now, to enable himself to proceed to hearing without an appearance on the other side, issue a citation, called a *citation to all effects*, the purport of which is to desire the defendant to come and see all the proceedings which are to be had, recounting them minutely up to final sentence. A libel is next lodged in the registry, and an order made that the opposite party do answer it within a certain time, which he not doing, his non-appearance is taken for a negative contest (10) or plea of the general issue, and the plaintiff or promovent proceeds with his proofs, and goes on to hearing.

A door to see justice

2dly. Now suppose the party absconds and cannot be served, or it cannot be found where he is, though he doth not intentionally conceal himself, the primary citation being returned with a *non est inventus*, in the former case a citation *viis & modis* issues, in the latter a public edict.

ad

The citation *viis & modis*, as the name imports, must be executed in all or any of the ways that occur of making it most public—by publication in the street, or in the church in

(10) But in the prerogative where the proceedings are *summary*, upon the return of the first citation, the non-appearance is taken for a negative contest, and you pray liberty to file a libel, no *videndum ad mandate*, nor any thing of that kind being necessary, except in proceedings for costs, and such like.

time of divine service, or by affixing it to the door of the mansion-house (11) or parish church of the party, or perhaps, (which is the usual way of executing the public edict), by affixing it on the public exchange, or some such noted place of resort. The public edict is executed in the mode last mentioned.

The citation *viis & modis*, or public edict, being executed, a certificate must be made of the premises, and the citation brought into court; and if the party cited then appear not, the proctor of the opposite party accuses his contumacy, he being first three times called by the crier of the court, and in pain of his contumacy requests that he may be cited to shew cause why he should not be excommunicated, which being also returned with a *non est inventus*, a *videndum ad mandate viis & modis* issues, and the party is then excommunicated, and afterwards denounced excommunicate; after which a citation *to all effects* issues, upon the return of which liberty is given to the promovent's proctor to exhibit a libel, and produce and examine witnesses, and to go on to sentence.

3dly. The third case is where the party has appeared, and appointed a proctor who exhibits a proxy, and afterwards wants to disappear again. In the prerogative court this doth not signify, as he can be proceeded against in his absence; but

(11) The outward door, for the house cannot be entered for the purpose without consent.

in the consistorial court formerly infinite delay and mischief were occasioned by this trick of an impugnant, because his adversary was obliged in such case over and over again to proceed by *videndum ad mandate*, even to compel him to answer or join issue upon a libel or allegation (12). In the consistorial court, therefore, the late eminent judge established a rule, which has been followed by his very learned successor, that either party, when he appears and exhibits a proxy, cannot disappear under pain of suspension of the proctor attempting so to do, which salutary mode renders the old tedious process in such case unnecessary. There seems, however, to be a difficulty where a personal answer is called for, for that the proctor cannot give in ; but I have heard it said, that in such case, for want of the answer, the party would be excommunicated *instante*. And in another case the party must be proceeded against personally and excommunicated, and the appearance of his proctor can be of no service, or rather his appearance is suspended, viz. where the party is contumacious in not obeying the order of the court respecting the payment of alimony. (13).

APPOINTMENT OF A PROCTOR.

The citation being returned, a proctor in the usual course appears for the promovent, and sup-

(12) This is founded in the practice of the canon law.

(13) There may, perhaps, be other cases which do not occur to my recollection.

posing the impugnant to obey the citation, a proctor also appears for him. These proctors may be recalled before contestation of suit, not after, in strict practice. After contestation of suit, and not until then, they become domini satis, the effect of which is, that they can substitute another proctor in their place, which they cannot do before, at least without a special proxy or a special clause in the general one (14), and may then proceed in the suit, even after the death of the client, and all notices are directed to them only.

The proctor is to be appointed verbally by the party present in court (15), or by writing under seal attested by a notary public, or sometimes merely signed by the party. And though he have such authentic proxy under seal for all general purposes, a special proxy may still be requisite, to give him authority for some particular purposes.—E. G. in a testamentary cause, suit having been contested, and the will denied, the party cannot afterwards come in and confess the will on his general authority without a special proxy for that purpose; if therefore he has no special proxy, he must let the cause go

(14) This is usual, and includes a clause empowering them to substitute from the beginning. Notices of motions, &c. are not recognized by these courts, as by the courts of law, though they may be used by the proctors inter se for mutual information.

* When he appears under

(15) Usually in writing.

which he is often obliged to attend his protest, i. e. to take oaths of exception in a sort of informal plea termed an act of petition. This act of court is entered into the ground of exception may be stated specifically & the &c. is usually termed an act or protest. &c. p. 512

on upon proof, to a hearing *ex parte*, which indeed is the usual and best mode.

Proxies are always necessary, but particularly in the prerogative court, because there they proceed in the absence of the party, which cannot be done in the consistorial courts.

The proctor ceases to be proctor, and is *functus officio* after sentence and appeal, or by the death of the party before contestation of suit, or he may inform the court at any time that he wishes to be no longer employed for the party.

In ancient times, besides the libel, there were put in, after contestation of suit, positions and articles (16). These are all now comprehended in the libel.

The positions were intended to be answered by the adversary, the articles to be proved, and what was posited could not be controverted, *qui ponit fatetur*, but neither of them were in an interrogatory form, any more than is any part of the libel in the spiritual court.

LIBEL

We shall here consider the requisites to a good libel, in considering which Gail will be an excellent guide. It must consist of a narration and conclusion (17). It must be apt, and the ineptness of the libel is chiefly to be looked for in the conclusion or prayer, which restrains the

(16) By the practice of the canon law.

(17) See Gail, lib. 2. Observ. 61, et deinceps,

* see book 1, article 39 "bonhomie et"

narration to what itself contains, and which is absolutely necessary in civil cases, though not in criminal; but as a general prayer has the same effect as in the courts of equity, it is generally put in, in the same salutary manner, e. g. thus: *wherefore this party prays right and justice, and with costs, &c.* or perhaps a little more particularly thus: *wherefore this party prays right and justice, and that she may be separated from the bed and board of the said A, and that he may be compelled to pay sufficient alimony to this party, according to his fortune, quality, and condition, with alimony pending this suit, and costs.*

The proper definition of an *inept* libel, is when there doth not appear therein a cause of action; if the libel be inept only in part, it doth not vitiate the whole.—The judge is if possible to support the libel, and interpret it favourably for the plaintiff, and when he rejects it, according to Gail he may, without dismissing the defendant, enjoin the plaintiff to exhibit another libel clear and properly conclusive.

The libel must be clear and explicit, for otherwise how can the defendant know how to defend himself, or the judge how to pronounce sentence? and this is particularly necessary in a criminal suit (18). Obscurity, says Gail, may arise in a libel, on account of its being too

(18) Gail, lib. 1. Obs. 67. This must mean, I take for granted, before contestation of suit.

general, too indefinite or vague, equivocal, or alternative.

The other characteristics of a good libel, such as that it should be sufficiently certain, not idly long, irrelative, or argumentative (19), are too obvious to need discussion. Heineccius laughs at many of the clauses usually inserted, and even at the prayer for costs, which, says he, the judge is by his office bound to decree, though not mentioned (20).

The promovent's proctor, on putting in the libel, prays the impugnant's proctor's answer, who then prays a time to be assigned him to prepare an answer, which in the common course is the next court day, but may be enlarged at the discretion of the judge. The promovent's proctor also says, or rather is supposed to say, that he repeats the libel, and prays it may be repeated *in vim positionum & articulorum* (21). *See ante*

(19) " In criminalibus libellus obscurus vel generalis non procedit, etiam parte non opponente, sed debet esse certi criminis loco & tempore coarctati, ita ut reus negativam loco & tempore coarctatam probare possit—aliter defensio tolleretur." Gail, lib. 1. Qbf. 612. There is no point in which libels are so apt to offend as this; hence our pleadings in the spiritual courts often bear the resemblance rather of a lawyer's speech, than of a party's pleading; full of *invektive* and *inference*, when they should contain only *averments*.

(20) On the Pandects, part. 1. 338.

(21) For the meaning of this see *ante*, p. 461.

Caveators must both allege immediately. A copy of the libel must be given to the impugnant by 2 Henry V. stat. cap. 3. but no prohibition will go to the admiralty for refusing the copy of a libel, for the stat. 2 Henry V. doth not extend to the admiralty. See Salk. 553.

* The libel being thus filed with all due circumstances, the next step is for the impugnant to give in his answer to it. *His admission may be opposed by dilatory pleas in bar or by demurrers, or by pleas in abatement.*

EXCEPTIONS, REPLICATION, AND CON-

TESTATION OF SUIT.

after the return of the libel.
The libel is answered in a general manner by a concession of its truth, which is called *contesting it affirmatively*, or by a general denial in the nature of a plea of the general issue, which is said to *contest it negatively* (22): Or it may be opposed by exceptions, in the nature sometimes of demurrers,—at other times of pleas in bar, or in abatement, as shall be explained presently; or by pleadings, filed in these courts matters *contrary, defensive, or justificatory*; and in common parlance, any one of these is said to make a contestation of suit (23), though inaccurately.

(22) The usual form of contesting it negatively is, *admit the same as far as, &c. &c. and contest the rest negatively*, A. B. advocate.

The &c.s. mean as far as it makes for, or is favourable to my client.

(23) Strictly speaking, contestation of suit is confined to the *general issue*.

If the impugnant neither confesses the promovent's libel, nor contests it negatively, which is pleading the general issue, he probably then puts in an exception, which exception may be either *peremptory* or *dilatory*; ~~if~~ ^{if} it perempts the suit, it must do so either for cause apparent on the face of the libel, or for cause first appearing in the exception itself. In the first case it answers to a general demurrer,—in the latter, to a special plea in bar.

If it doth not perempt the suit, but excepts for the defect of form in the promovent's pleadings, or for matters set forth in itself, but not amounting to a bar, it answers in the first place to a demurrer for want of form, in the latter to a plea in abatement. But still to all these various pleadings, the civil law has assigned only the general name of *exception*, with a distinction into those *dilatory* and those *peremptory*.

In modern practice indeed more names of pleadings have been introduced over and above those known to the ancient. If the plea be a justification, it is called a *matter justificatory*—if it be of an excusing nature, and contains much defence, but does not amount to a full justification, it is called a *matter contrary and defensive*; and if it denies the fact not generally, but specially setting forth special circumstances, it is called a *matter contrary* only (24).

(24) The distinction of the civil law between *exceptions* properly so called, and *defences*, doth not seem however perfectly to tally with the distinctions above, which I have

To illustrate all these by example: if in a suit for jactitation, the party can positively deny the fact, he *contests the libel negatively*; but suppose in a suit for jactitation of marriage, that it appeared on the face of the promovent's libel that he had no cause of suit, a *peremptory exception* in general terms, in the nature of a general demurrer, might be put in by impugnant.

If on the other hand the libel was perfect, but a bar is started by the impugnant, as for instance, that the cause was substantially tried before in a suit in which the present promovent might have

not taken from books, but collected from my own observations. See Heineccius ad Instituta, lib. 4. tit. 13. *Proprie dicitur exceptio quando actori competit actio, quia est actionis exclusio, quando autem actori nullo actio competit, id quod opponit reus proprie vocatur defensio.* Lanfranci praxis, ch. 4. de exceptionibus: but by modern jurists, the latter are called exceptions of fact, to distinguish them from the others, which are called exceptions of law; for in its most extended sense, the word *exception* included both, and was *omnis rei allegatio ac defensio qua intentio actoris vel ipso jure vel ob æquitatem eliditur.*

Pleas in *excuse*, or in *justification*, are so common in law, (though they have not been so strongly distinguished from other pleas as in the ecclesiastical court) that the above distinction which I have taken wants no comment. I will not say that the above distinction between matters *contrary*, and matters *contrary and defensive* is accurately observed, but it seems to me the true one. A pleading is sometimes called a matter *peremptory and defensive*: for instance, a woman institutes a suit for a divorce on account of cruelty, and for alimony, the husband may plead adultery in her, which *perempts* her demand for alimony, and in some measure *excuses* or defends his harsh behaviour.

intervened, the objection is urged in a pleading called also a *peremptory exception*, but in the nature of a *plea in bar*.

If no such objections are in the power of the person of the impugnant, he may perhaps find defects in the form of the libel, e. g. for omitting the setting forth of time and place, or for not annexing documents therein referred to, and mark them by an *exception*, not called peremptory, but simply filed an exception, which is in the nature of a demurrer *for want of form*. Or he may possibly object to the jurisdiction of the court, or plead that the promovent is a minor, not competent to institute a suit, by *exceptions* in the nature of *pleas in abatement*.

But now let us revert to the second case, and suppose that the impugnant has a plea in bar, and that it not only perempts the suit, but amounts to a justification, e. g. that he had a right to jactitate, for that a marriage had actually taken place; he, probably, instead of calling his plea a peremptory exception, will call it a *matter justificatory*; if on the other hand he cannot justify, but has matter of excuse, e. g. that he did not boast or jactitate in order to hurt the good name of the promovent, but at her own earnest request and desire, it will be called a *matter contrary and defensive*.

If after all impugnant finds he has no occasion to have recourse to any of these defences, and is able to deny the fact, but fears that upon such a

general issue he shall not be enabled to give in evidence special facts, supporting his denial, and making the charge of promovent impossible or improbable, he may put in simply a *matter contrary* (25), stating the defence specially. *

The promovent is now called upon to reply, which he may do in various ways: he may (according to the case) think proper to plead and contest the admissibility of the adversaries' exception, which may be compared to joining in demurrer; or if it has been in the nature of a plea

(25) This last instance may perhaps be better illustrated in some other suit. Suppose in a suit for restitution of conjugal rights, the impugnant wishes not only to deny his marriage, but to shew the improbability of such a marriage from the mean situation of the other party. Suppose in a suit for tithes, insisting upon a usage, he might wish not merely to deny the usage, but to shew something quite inconsistent with such an usage. Again, suppose in a suit for a divorce for cruelty and expulsion from the husband's house, the husband should plead condonation, and that the wife had come back and cohabited; and suppose that she really had returned to the same house from necessity, but not *animo cohabitandi*, and had lived in a different wing of the house and never seen him, a bare denial would never do, without explaining all the circumstances by a contrary matter; and here a question may occur, whether after a negative contest, such a contrary matter may be added upon further consideration, and I have known it to be done. It may be awkward, but I see no inconsistency in it. In old pleadings, as I find by the registry books, these *matters contrary* are sometimes filed allegations.

in bar, he may contest it negatively, or may perhaps put in a peremptory exception to it on his part, in the nature of a demurrer; or he may literally *reply*, as if the will of a woman deceased be alleged, B. may possibly plead that she was married, and could not make a will.—A. replies that the marriage was void: but such *special replications* are not frequent.

In the old books of Roman and civil law, we find mention of duplications, triplications (26), and quadruplications, answering to rejoinders, rebutters, and surrebutters, but they are very seldom in use.

The pleadings being arrived at their completion, the parties must at length have come to a direct issue or contradiction, not with the strictness of our legal proceedings which require an issue upon a single point, (though that point need not consist of a simple fact) (27), but to some general denial and contradiction made by the last pleader of the exception, replication, or other matter immediately preceding—*Status fit questionis; judicii suscepti utrinque facta est professio*, i. e. the parties have agreed what is the question really to be tried, and are ready to go into evi-

(26) Names formerly of pleadings of English law To go beyond a duplication was bad pleading. I have, among other precedents, one instance of a duplication, but I have seldom known it; however, in a late appeal of Evans and Napier, in Ireland, this whole train of pleading was gone through.

(27) Burr. p. 320. H H 3

dence; and here again the ambiguity of the terms *litis contestatio* occurs, and the parties are frequently in books said at this stage to have arrived, and not before, at the *litis contestatio* (28).

(28) It is very remarkable that Oughton gives no express chapter on these pleadings, nor any aid to the analysis of them, nor treats of exceptions, except those to *testimony*, so that I have been obliged to depend on observations and reflections, without any assistance from books. Oughton merely treats of the general negative contest to the plaintiff's libel, which is the only thing that he professes to mean by contestation of suit; and Heineccius, though he admits that these words are sometimes used in the sense mentioned in the text above, evidently considers that as an abuse of the words. If the rule of our law be the same with the civil, that no dilatory exception can be put in after contestation of suit, it becomes important to know the proper sense of the words, a question which has been discussed in the chapters on the civil law. Perhaps, after all, these suits resemble the actions *bona fidei* of the Romans, in which this strictness was unnecessary. But though the strict meaning which I have annexed to the contestatio *litis* of the civil law be acknowledged by Judge Blackstone, who says, it is a general assertion that the plaintiff has no ground of action, yet in common practice Maranta's assertion is true, *primus actus qui solet immediate fieri post litis contestationem, in causis in quibus lis contestatur habet, vim litis contestationis in causis in quibus lis non contestatur.*

*In Blackstone's "Citation" is a statement
that the party is to be in a position
to make a statement of the facts of the case
and to require a true statement
of the facts of the case by any and all
parties to the suit is considered by any and all
parties to the suit as a fully made
statement of the facts of the case.*

THE SECOND STAGE OF THE CAUSE IS
FROM CONTESTATION OF SUIT TO
CONCLUSION.

ADDITIONAL ALLEGATIONS.

The suit is now completely contested, and the parties ready to proceed to proof; but as I have hitherto, for the sake of simplicity, considered the promovent as having only a right to put in one allegation (as a plaintiff at law files but one declaration) and as he has a right by the course of the court to put in three, each supporting and strengthening the preceding, it is necessary to observe, that whatever has been said hitherto of the one libel, must be considered as applying to each of these three, when they are put in; to explain this further, the promovent having received light from the pleading of the incumbent, amends his bill, to use a phrase familiar to the equity lawyer, i. e. he files a second allegation (for this part of the proceedings may be more justly compared to those in our equity courts, than in those of law), and in the same manner he may file a third; but he can go no further, though one would imagine from what is said by Oughton, in the notes to titles 112 and 113, that formerly he could.

But though in some respect a comparison may

thus be made with amended bills in our courts of equity, in others the comparison totally fails. The opposite party always pleads to these allegations; and though he may be also called on to answer them article by article, never doth so unless particularly required, so, that upon the whole, the practice widely differs from that of courts of equity (29). ✓

When the custom of putting in these additional allegations originated I know not, for we find no mention in the ancient civil law of more than one *libellus*; and indeed, in strictness of speech, I conceive still, that the first pleading or charge of the plaintiff, or promovent, is the only one properly called the *libel* (30). I can as little find

(29) In one respect it hath a manifest advantage, the power which each party hath to demand the answer of the other to every pleading that is put in; whereas a defendant in chancery cannot procure the answer of the plaintiff to any new matter or allegation brought forward by him in his answer, without filing a distinct allegation, viz. a cross bill. The late Dr. Ratcliffe, whose practice had been entirely in the common law courts (where he arrived at the first eminence) until he was made judge of the prerogative, often told me, that in his opinion (and his opinion could not be biaised that way) the method of investigating and coming at the truth in the ecclesiastical courts, was preferable by far to any that he knew.

(30) I consider the libel as the declaration or bill of complaint. The additional allegations do not charge new or distinct causes of suit, but only new circumstances and additional facts in confirmation of the original cause of action.

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when the number was limited to three; for, as I have observed, Oughton seems to speak of the number as only limited by the discretion of the court, or in consequence of some rule served upon the adversary (31).

The defendant or impugnant has also a right to put in three defensive pleadings; but in testamentary and administration causes, both parties are actors or plaintiffs, as at law in a replevin cause, and therefore you do not in them hear of *defensive matters*, &c. &c. but each party puts in, or may put in, three *allegations*. The husband charged with cruelty, or the wife with adultery, are to *defend* themselves, but the party setting up a will, and his opponent setting up intestacy, are

Allegation en termes de Palais est la citation d'une autorité d'appuyer une proposition. Encyclopedie of Diderot and d'Alembert. Paris, 1751.

Allegationes partium—*rationes* quas Reus & Actor producunt; hinc nata *nostris* vox familiaris *alleguer* de eo qui instrumenta vel *testes* vel *rationes* pro suo jure tuendo profert. Du Fresne's Glossary. The word comes not from *allegare*, which is *ad alium mittere*, but from *alligare*, i. e. *ad ligare*, to tie or annex to. 910 *

(31) Est & alius modus refrænandi has *secundas*, & aliquando etiam *tertias* & *quartas* propositiones materialium, sive *allegationum*; tit. 112. note. The two methods appear by that and the following sections: 1. Petendo expensas retardati processus; 2d. Assignando terminum infra quem—ad amputandas dilationes, si multiplicentur *allegationes*.

Verba mea: alio alio

both plaintiffs and *claimants* of deceased's property upon different grounds.

Barn * PERSONAL ANSWERS. *with oath*

We must also, before we proceed to depositions or proofs by witnesses, consider personal answers, which may prevent and anticipate the necessity of such proof. The suit, which hitherto may have been compared to one at law rather than in equity, here assumes the latter form; for the promovent is at all periods of the cause after contestation, even down to the hearing, entitled to the aid of impugnant's answer upon oath; and if it be refused or delayed, he proceeds with nearly the same process of contempt to enforce it, as was used to enforce the party's original appearance, with this difference (32), that where he is excommunicated for not answering, I have heard it said, there is no occasion for a citation to all effects, previous to proceeding with the cause, but the contrary seems to be the truth.

The impugnant of course cannot read his own personal answer; but if the promovent reads part of the answer to any one article, the impugnant

(32) In fact, each party is entitled to the answers of the other upon oath to every one of his pleadings, but to avoid complication and confusion, I have simplified the subject by considering only the promovent and his libel. It is easy to generalise the rules above.

has a right to read the whole of the answer to that article.

Exceptions may be put in to these personal answers, as to an answer in chancery, for being short, impertinent, or scandalous.

Term probatory
PROOFS AND DEPOSITIONS.

When the party from the stage of the cause is called on to proceed to proof, a term probatory is granted, within which witnesses are to be produced, which, by the course of the court, lapses, or is terminated on the next court day; this is thrice repeated, so that the three probatory terms would, by the stile of the court, lapse on three successive court days, if they were not continued (33), which they almost always are, and that for a considerable space of time, since, in scarce any instance, could it be possible for the party to bring up witnesses, perhaps living at a great distance, nor for the examiner to examine them, within the ordinary curial terms. The term probatory is common to both parties, i. e. each may examine during the time granted to the other, and as long as it continues; and there are three terms probatory granted on the putting in each and every

(33) This is done for a reasonable and proper space of time, till the witnesses are examined, merely by the proctor, (when the register mentions the state of the cause) praying to continue; until the opposite party, or the judge, object to any unreasonable delay.

one of the three allegations or pleadings, which each party is at liberty to put in or file ; during which terms probatory, each party is at liberty to produce witnesses, not only to the matters in the last allegation put in, but also to those in all the preceding allegations, so that until publication, and as long as any term probatory is in existence, the whole cause, and all the contents of all the allegations, are open to proof.

The term probatory runs, if the party who prayed it is delayed for want of the personal answer of his adversary, only from that answer coming in ; and though it may have lapsed, yet for special cause the party will be restored to a term probatory by the court : on the other hand, if the party obtaining it afterwards should change his mind, and think it unnecessary to examine further witnesses, he may renounce it ; except it has been granted in pain of the opponent's contumacy, who absents himself, or except the other party has accepted it, and protested of using it as common to both, unless he so accepts it merely for delay, and afterwards doth not examine witnesses, in which case he must pay costs of process retarded (34).

The witnesses must be summoned to attend, either personally, or if they cannot be found, by a citation *viis et modis*, and their expences offered

(34) See Oughton, tit. 75.

them (35); and if they refuse, may be excommunicated; but if they live out of the jurisdiction of the court, a requisition must go to their own proper judge to examine them. The probatory term is naturally continued by contumacy of the witnesses to give time to subdue it; but if the judge has reason to think that their absence is the effect of any collusion or trick to delay the cause, he may proceed to conclusion; but yet if they afterwards appear, and are absolved, and their contempts purged, conclusion is rescinded, and they may be examined (36).

The witnesses not contumacious are produced in court within the probatory term, and sworn; or if at a distance, a commission issues to examine them (37). On their production, Oughton gives particular directions about the adversaries dissenting to their production, and protesting of its nullity, which in practice is not now done, the adversary merely swearing them to give true answers to his queries, in case that he means to cross-examine them. Oughton says, that the

(35) This vaticum, by the course of the court, is usually from one to four shillings a day while delayed, and four-pence a mile while on the journey.

(36) Oughton, tit. 78.

(37) Oughton says, in a note, title 80. though the witnesses must be *produced* within the probatory term, they may be *examined* after it has lapsed, and so is the practice. All that is necessary, is to produce them within the time.

judge admonishes them to appear to be examined before the next court-day, or within some competent time, but neither is that the modern custom (38). The party producing them gives notice to the opponent of the articles of his libel, to which he intends to examine them.

The witnesses produced becoming thereby common to both parties, the adversary may administer to them interrogatories, which he must do within twenty-four hours, unless further time be granted (39). A copy of these interrogatories, according to Oughton, is not to be given to the opponent; and this cross-examination doth not preclude objections to the witnesses (40). The party producing them cannot impeach his own witnesses, inasmuch that though he may afterwards chuse to wave their examination, yet he cannot prevent the opposite party from cross-examining them.

The witnesses are to be secretly and separately examined, not in the presence of the parties or

(38) The court usually admonishes them, that they must attend the examiner of the court to be examined, and that the examiner will give them due notice of the time.

(39) Each party may read the evidence given by his own witnesses, as well as by those of his adversaries, on their cross-examination.

(40) i. e. As I conceive, to their sayings, for I apprehend he cannot afterwards object to their persons. Oughton thinks, that interrogatories more frequently prejudice than assist the party offering them.

other witnesses. Their depositions, after being read over to them article by article, and they asked whether there be any thing which they wish to alter or amend (41),—are then to be signed by the witness, and be afterwards *repeated* before the judge, i. e. asked again in the open court by the judge, whether there be any thing which he wishes to correct or alter. This is indispensably necessary, because though the examination is before the examiner, it is always presumed, says Oughton, to be in the presence of the judge.

If the witnesses, through illness, imprisonment, age, or infirmity, are incapable of attending, although resident, the judge, or his surrogate, or I suppose the usual examiner, may attend and examine them at their own houses; and if they live at a distance, they must be examined by commission proceeding from the judge, if they are within his jurisdiction, otherwise letters requisitory must go to the bishop within whose diocese they reside, requesting him to examine, or have them examined, as it is called, *sub mutuae vicifitudinis obtentu* from the mutual aid thus mutually granted by the several ecclesiastical jurisdictions.

(41) How much is this preferable in some respects to an examination at nisi prius, where every incautious or hasty expression is instantly bellowed to the jury and insisted upon, without giving time to the witnesses to correct a particle; or if he attempts to do it, perjury or prevarication is immediately charged on him?

I shall first consider commissions issuing within the diocese where the cause arises. These commissions used to issue to such persons as the judge might please, two or more being usually nominated to him by the proctors of each party, for his approbation, originally ecclesiastics, but latterly very often laymen, empowering them jointly and severally (42) to sit and examine, at an appointed time and place (43), assuming to themselves an actuary, i. e. a register, properly among the notaries public, with a term assigned for transmitting or returning the commission, and the term probatory is to be continued to the day of return, and proper notice (44) given to the opposite party of the time of opening and proceeding on the commission.

Such was formerly the practice, a practice which Oughton himself observes is fraught with many mischiefs, inasmuch as the commissioners so nominated will naturally make themselves parties, and be in danger of not examining indiffer-

(42) Such is the tenor of ecclesiastical commissions in general, except to the court of delegates, whose commission runs *to you or two more of you*, so that one could not proceed.

(43) The place properly a church, now improperly very often an inn. The place, if in foreign parts, cannot be so definite.

(44) Which is three days, according to Oughton.

ently, and deviating into perpetual contests (45). The wisdom therefore of judges in Ireland, and I take it for granted in England, has taken a hint from the suggestions of Oughton, and has, within these few years, ordered that no commission should be directed but to an officer of the court, and that the proctor of either party, if he chuses to have the commission attended, must do so either in person, or by a substitute, who must be a proctor (46).

When commissioners used to be appointed, the commissioners being assembled at the appointed time, were to accept the commission, (and though some were absent, they might subsequently accept it), and to appoint an indifferent person actuary, usually a notary public; and to take care that one should not be imposed on them by the party bringing down the commission, who might be partial to himself. Now that an officer of the court examines, who is probably a notary public himself, it is often thought unnecessary to assume an actuary (47).

(45) See second volume, p. 423, Practice of the Admiralty, note 35.

(46) See second volume, p. 423, note 36, Practice of the Admiralty.

(47) The delay and expence of the old method of appointing commissioners, was to my knowledge extremely grievous. The present mode is a wonderful saving to the suitor, while at the same time his business is much better

The opposite party may join in the commission to save expence, and examine his own witnesses under the same: when the commission goes down, he may administer interrogatories, or if he does not chuse by his proctor to be present, he may, at the time of speeding the commission, deliver in his interrogatories to the register, not to be shewn to any person until the commission be opened; but if afterwards he chuses to be present by his proctor, these interrogatories may be substracted, and new ones administered: if no interrogatories be previously prepared, he usually gets a reasonable time from the commissioners below to prepare and bring in interrogatories, having only twenty-four hours in strictness.

If the adverse party doth not appear at the time of speeding the commission, he is to be thrice publicly called, and every thing is to be done in *pœnam contumaciæ*, *in pain* of his contumacy; and Oughton thinks, that if he doth not chuse to be present, he ought to take care, at the time of granting the commission, to protest of nullities, for that otherwise he cannot afterwards, except against the witnesses. Tit. 86. sec. 11.

The certificate of the execution of the commission is to be directed to the judge, subscribed and

done by an examiner and proctors, well acquainted with the rules and practice of the court, in which the blunders of strangers to it were innumerable and infinitely mischievous.

signed by the persons appointed to expedite the commission, and containing all the acts done by virtue thereof. Every leaf of the depositions should be subscribed not only by the witnesses, but also by the commissioners, and the whole carefully sealed up with an authentic seal, until produced in the court from whence it issued, and aperture there prayed.

The manner of executing a commission to examine witnesses in another diocese (for no man can be cited to appear out of his own), doth not materially differ, except that it must issue and be directed to the bishop of that diocese, or his vicar-general and official principal, and be attended with letters requesting or praying them to compel the witnesses to appear at a time and place which must be named in the requisition, to examine these witnesses, and transmit the depositions (48).

The court has sometimes referred a question of hand-writing, or forgery, to a convention, similar to a jury, of proctors.

If the commission is to be executed in foreign parts, it may perhaps be directed to the principal magistrate of the place, or his deputy; and in such case, as it is difficult to ascertain the exact time, the commission may be more indefinitely directed to be executed between such a day and

(48) I have known a register of one diocese examine by consent in another, but then he could have no power of process to compel witnesses.

such a day, giving due notice a certain number of days before to the opposite party.

PUBLICATION.

Whenever the proctor of either party doth not intend to produce or examine any more witnesses, he may pray publication, which sometimes on special circumstances is prayed, saving the examination or repetition of some particular witness. Publication may be stayed on sufficient cause at the prayer of the opposite party, and putting in a new pleading upon his part (if the whole number allowed him be not out) is always sufficient cause, and stays it of course; so that where each party chuses to put in their three pleadings, and are ready with them, publication cannot pass till these are all exhausted, and the witnesses to them examined; but the party which prays to stay publication, must be ready with his pleading at the time it is prayed; it is for the court to determine whether publication be unreasonably or designedly delayed, or commissions tediously or improperly executed, and to act accordingly.

Publication having passed, and copies of the depositions being given out, if the witnesses have not fully answered to interrogatories, the court will oblige them to answer more fully; if other exceptions appear to the testimony, the parties

will offer them. These *exceptions to witnesses* are either general or special, the former offering general objections, the latter specifying particular facts, causes, and reasons of exception; and each of them may be to the *persons*, as that they are of infamous character, or to the *sayings*, that they are contradictory, repugnant, or *extra-articulate* (49); and the party may, saith Oughton, demand the oath of calumny or malice (50) from him who excepts generally, to oblige him to shew that he doth not except for the sake of delay.

Probatory terms are granted on these exceptions, and commissions to examine as in the principal cause.

The party to whose witnesses exceptions are made, may bring others to *corroborate* them, and may also impeach the witnesses produced to support the exception, (who are called *reprobatory* of

(49) The objection to extra-articulate depositions is evident. The other party thus cannot know to what the witnesses have been examined, and therefore cannot properly cross-examine them—giving him a copy of the articles to which they are to be produced is so of little use to him. The examiners are very faulty when they suffer it.

(50) The form of the oaths of calumny and malice is found in Oughton, Burn, &c. I have never known them in practice, yet I have heard it said, from high authority, that they may still be administered, not only to proctors, but even to advocates—*sed quere*.

the original ones), by others *reprobatory of them*, but the contest can go no further; according to the adage—*In testem testes, & in hos, sed non datur ultra.*

Exceptions (51) ended, *instruments* or written documents remain, which if alleged in the libel, should be produced before contestation of suit; in general they may be produced at any time before conclusion, or afterwards, if subsequently discovered (52); and I have known them allowed to be produced at the hearing, though alleged long before.

TERM TO PROPOUND.

Publication being passed, and the depositions known, if no exceptions to witnesses intervene, or if they have been disposed of, the *term to propound all things* follows; which means a term limited, within which the defendant is called upon, if he has any further proof or defence to make, to bring it forward; if, then, after all that has passed, the impugnant has any further defence to make, new witnesses lately discovered without

(51) The party excipient, however, may corroborate his witnesses alio. Corroboration cannot aid those to whom specific objections have been put in, says Oughton, in a note to title 102.

(52) They are usually alleged with these concomitant words, *which he protests of exhibiting in due time and place.*

aud or covin to introduce, or real objections to make to those of his adversary, which he could not make before, he may still do it; but if he attempts any thing of this kind with intentions of delay, the sagacity of the judge will induce repentance on him in a load of costs: and if on the *day assigned to propound all things* he has no new defence or objection to make, *conclusion* follows. This term to propound all things, as Oughton admits, is not a creature of the ancient law, but an invention and usage of judges in the latter times.

CONCLUSION.

Conclusion also Gail admits not to be *de substantia juris*, or known to the civil law, though perhaps it was to the canon: it is however plainly conformable to good sense to put an end and conclusion to the suit, *malgré* any litigious perverseness of the parties; and accordingly (53) *conclusion* forbids the filing any further allegations, or adducing any further proofs, even by instruments, except as far as leave is reserved to exhibit

(53) So says Oughton, but in practice I have known them constantly, if records of courts, such as bills in chancery, or public instruments, produced at the hearing upon leave obtained; on condition sometimes of alleging them, that they may be impugned by the opposite party.

I have known them constantly, if records of courts, such as bills in chancery, or public instruments, produced at the hearing upon leave obtained; on condition sometimes of alleging them, that they may be impugned by the opposite party.

them at the hearing (54): and when conclusion takes place, the judge is prayed to *assign* a term to hear sentence, and to inform on the next court day; on which day, or as soon as the judge may please, he hears the cause; advocates state the case on both sides, the depositions are read, council (55) are heard to evidence, and the judge is ready to proceed to sentence.

To hear this sentence, by the ancient practice a citation issued to the unsuccessful party; but now, when he has once appeared, he is merely called, and sentence passes in pain of his contumacy.

THIRD STAGE OF THE CAUSE—TO ITS TERMINATION.

SENTENCE—EXECUTION.

Conclusion having passed on the day assigned to conclude, the promovent prays a term to be

(54) The tediousness of suits in the ecclesiastical courts is a common and trite topic of abuse. I scarcely ever knew any one of them, even the most complicated, last two years. How few equity suits are so soon over!

(55) The common lawyers, though not allowed to sign pleadings, are admitted to speak in these courts in Ireland; for in that kingdom the common lawyer is not much distinguished from the civilian; multiplicity of business has not produced division of labour.

assigned to hear sentence, and to inform, viz. on the next court-day, on which day information being given to the judge, i. e. he having heard the proofs read, and the statement and arguments of council or advocates, proceeds, as soon as he is satisfied, to give sentence (56), which is offered to him in writing by the proctor, signed by an advocate, and if approved, is then signed by the judge. As to execution, every one knows that where the sentence doth not execute itself, if it be disobeyed, the ecclesiastical power is only that of excommunication, in which it is supported and rendered formidable by the aid of chancery, granting, where the party continues obstinate, the writ *de excommunicatio capiendo*: concerning which, I shall only observe, that all the churchmen insist that this is a writ *ex debito justitiæ*, though my Lord Coke says, it is only *ex gratiâ*. But at all

(56) The order then of rules from publication, if no particular obstacle be interposed, is thus:

1. Publication decreed.
 2. The judge assigns to *propound* all acts next court-day.
 3. On that day all acts being propounded, judge assigns to *conclude*, unless cause, next court-day.
 4. On that day conclusion decreed, and judge assigns to hear sentence, and to inform on next court-day.
 5. On that next court-day, information and sentence.
- Such is the scheme of Oughton; but in practice in Ireland there are three assignations to hear sentence, in plenary as well as in summary causes, as will be seen presently by the rules in *Maddock v. Logan*.

to be published at the next court-day.

events, the bishop's *significavit* must shew sufficient cause.

* When it appears to a third person that his interest is any way concerned in any cause, he may *intercene*, proving his interest. This he may do in a matrimonial cause at any time, but in general he must proceed in the same state in which the cause was when he intervened. *Secretly for proceeding with 570*

I shall only here add, that if the impugnant in a criminal cause has any countercharge to make against the promovent, it ought to be recriminated by way of what is called *reconvention*. Thus, if in a cause of defamation, the impugnant can retort the charge of defamation on the other party—if in a cause of divorce for adultery, the wife denies the charge, but in her turn seeks a divorce for cruelty—she reconvenes the promovent, and files what is called a reconventional matter (57).

Having now done with *plenary* causes (58), I am to proceed to *summary*, but as those of a sum-

(57) To *convenc*, in the Roman law, was a technical term, signifying to bring an action.

(58) I shall further illustrate the practice in a plenary cause, by the actual rules in one strongly contested.

MADDOCK v. LOGAN.

Citation.—Certificate of the execution thereof continued *. Promovent filed a libel. Impugnant exhibited a

* To continue a certificate of execution is to give farther time to execute and certify. Every citation must be returned in the term in which it issues, or the next.

mary nature in the consistorial court are but few,
I will treat of them under the head of

PREROGATIVE COURT.

In this court, which is confined to testamen-
tary and administration causes, (except as matri-
monial, may come in incidentally, and that only

justificatory matter. Promovent admitted the same as far
as, &c. under protest of excepting. Impugnant prayed
promovent's personal answer to the articles of his justifica-
tory matter—decreed accordingly. Impugnant also exa-
mined witnesses to his justificatory matter, and they were
cross-examined.

Then the promovent put in an additional allegation, which
the impugnant contested negatively; then the promovent
moved for the personal answer of impugnant to promovent's
additional allegation.

21st April, publication decreed.

5th May, assigned to propound all things.

9th May, all acts being propounded, judge assigned to con-
clude, unless cause next court day.

26th May, judge assigned to conclude unless cause this
day, when impugnant, on petition and affidavit, prayed to
be admitted a pauper.

16th June, that motion was heard and the petition re-
fused, and then the judge assigned to conclude, unless cause
next court-day.

20th June, in opposition to conclusion, impugnant
prayed liberty to *allege* a letter and paper-writing affixed.

23d June, impugnant exhibited an additional justificatory
matter, with two instruments annexed; this was contested
negatively, and then the personal answer of promovent also
ordered to this additional justificatory matter.

where there are bona notabilia, viz. to the value of five pounds in different dioceses), all proceedings are said to be summary, as they are also said to be in the court of admiralty.

The strict description of a summary cause is that in which it is not necessary to give in a libel, but you may libel *viva voce* at the acts, and pray to proceed summarily; and the proctor for the impugnant is to dissent, and this *infers* contestation of suit, for *express* contestation is not necessary; and in which there is no assignation to *conclude*, nor *express* conclusion. To part of this description causes in the prerogative may seem not strictly to answer, since the pleadings are in writing, and the depositions taken down in writing as in the consistorial court, and each party contests

July 4th, personal answer given in to the additional justificatory matter.

It was then prayed that conclusion might pass, and ordered, unless cause next court-day.

July 7th, being next court-day, impugnant, as cause against conclusion, prayed that the term of law might be assigned to him for proof of his additional justificatory matter. And affidavits being read for the promovent, the judge refused to assign the term of law, and decreed conclusion, and assigned to hear sentence on the first assignation next court-day. Impugnant's proctor dissenting and protesting of grievance, and of appealing.

Nov. 7th, assigned to hear sentence on the second assignation next court-day.

Nov. 10th, assigned to hear sentence on third assignation, and to be informed next court-day.

Nov. 17th, information and sentence.

in writing the allegations of the other, so that great part of what has been said of the practice of the consistorial, applies to this court, except that all the causes being testamentary, and both parties plaintiffs, and no offence charged, you will not hear of matters defensive, &c. &c. but as there is no term to propound or to conclude, they are justly called summary; for after publication passes, instead of praying a term to propound all things, the party prays the first assignation to hear sentence, and if no cause shewn on that day, there is an *implied* or *inferred* conclusion, and he prays the third assignation, and to inform (59).

(59) CORRESPONDENT STAGES ACCORDING TO OUGHTON.

Plenary.	Summary.
The day appointed to propound.	1. Assign. to hear sentence.
The day assigned to conclude.	2. Assign. to hear sentence.
Assigned to hear sentence and to inform.	3. Assign. to hear sentence and to inform.

CORRESPONDENT STAGES IN PRACTICE.

Plenary.	Summary.
All things propounded.	1. Assign. to hear sentence.
—— Conclusion.	2. Assigned to hear sentence.
1. Assigned to hear sentence.	3. Assigned to hear sentence and to inform.
2. Assigned to hear sentence.	
3. Assigned to hear sentence and to inform.	

APPEALS.

X well applied in law

An appeal is either from a grievance (60), or from a definitive sentence or interlocutory decree, having the force of a definitive sentence.

If before sentence given, the judge, in the course of the cause, induces by his acts any grievance upon either party, as by his rejecting valid witnesses or proper allegations, it is cause of appeal from the *gravamen*.

If sentence being passed, a party finds himself thereby aggrieved, and that grievance appears on the face of the proceedings, he brings a *querela* of nullities; if he be aggrieved by matter intrinsic, he appeals.

The first kind of appeal, viz. from a grievance, must be made in writing, and must specially contain the circumstances of the grievance, as if proper testimony has been refused, and improper testimony admitted; the names of the witnesses, and the matter or their evidence, must

(60) The distinction between the practice of the civil and canon laws, and between the practice of the court of admiralty and that of ecclesiastical courts, that by the former no appeal lies, except from a definitive sentence or interlocutory decree, having the force of a definitive sentence, is a distinction universally known. An interlocutory has the force of a definitive, when no other sentence can be expected, e. g. if a peremptory exception be allowed in the outlet of the cause.

The commission of Delegates does not continue acts before sentence. You all or last of you, shall be present at the hearing in the commission of Delegates all or some of the members shall be present.

be set forth, and the appeal should be interposed in ten days, for in England it has been doubted whether the statute 24 Henry VIII. chap. 12. which speak of fifteen days, applies to appeals from grievances; and in Ireland there being, as I apprehend, no such statute, the rule of the civil and canon law, which give ten days, must govern (61).

The second kind of appeals, viz. from a definitive sentence, may be viva voce in the presence of the judge, *apud acta* at the time of the sentence, or in writing before a notary public, within ten days; or in England, by statute, in fifteen.

If the proctor appeals *apud acta*, he at the same time prays apostles, that is, short letters diminifory, signed by the judge, stating shortly the case

(61) It was so determined by the delegates about three years since, in the cause of Lecky and Cave, where an attempt was made to construe the law of Ireland otherwise, and to insist that there was in that country no legal limitation of time in appeals.

In the case of the Rev. Mr. Symes, in the year 1800, it was doubted, on an appeal from a rule considered as a grievance, whether the day on which the rule was made was inclusive: on this point the following authorities may be useful; *hodie cuilibet tribuitur spatium 10 dierum*. Code lib. 7. tit. 62. 6. This Maranta interprets *a die sententiæ*. 10 dies a recitatione sententiæ, Nov. 23d. cap. 1. intra. 10 dies ex quo fit gravamen, decretalium 11. Biduum vel triduum ex die sententiæ latæ computandum. Decreti 2 pars. Causa 2. Dif. 6.

From the name of the day on which the rule was made, it is evident that the day is not included, but the day after the rule is made, is the day on which the appeal must be made. 277

and the sentence, and in the room of apostles declaring that he will transmit all the proceedings.

If the party or his proctor doth not appeal *apud acta*, he may, dissenting at the time of the sentence afterwards, appeal *in scriptis* (62) within ten days in Ireland, and fifteen in England, by going before a notary, who draws up an instrument of appeal, containing a short account of the nature of the cause or the sentence, signs it before witnesses, and puts his seal to it, and thus it becomes authentic.

At the time when apostles are prayed, and granted, a time is appointed within which the party is to retrocertify to the judge *a quo* what step he has taken, who otherwise will proceed to execute his sentence. The apostles when granted

(62) It is incumbent on the proctor to appeal in one of these ways, unless otherwise directed by his client, for if he omits to appeal from a definitive, and any damage thence ensues, he is liable to an action to be brought by his client.

Appealing *apud acta* may sometimes be very necessary, as for instance, to prevent a person who has got administration by sentence from instantly intermeddling with the effects; at other times it may be expedient not to appeal *apud acta*, as if it apprehended that the judge will assign too short a time to retrocertify. See Oughton, tit. 294.

For the advantage of appealing in writing *in scriptis* from an interlocutory having the force of a definitive sentence, see Oughton, title 295.

(63), (if it be an appeal from a metropolitical or from the prerogative court), are carried to the lord chancellor's secretary, and upon the back of them the chancellor names commissioners, or judges delegates, and the commission being made out, two of them at least must accept it, which they having done, issue an *inhibition* to the judge below to stop all further proceedings, and a *monition* to transmit all the past proceedings, and this *transmiss* serves in the room of further apostles.

If the appeal be from a diocesan to a metropolitical court, the apostles are in the same manner carried to the archbishop's vicars general, who then issues an *inhibition* and *monition*, and has the *transmiss* made to him in like form as in the case before mentioned. This monition, according to Oughton, tit. 312. may be prayed at any time before the term probatory assigned.

If the appeal be from a grievance, and it be proved to the satisfaction of the delegates, or admitted by the party appellate, the cause is retained above, and the delegates go on to hear the whole merits (64).

(63) See second volume, Admiralty Practice, p. 438, note 53.

* (64) But why in common reason, should not the appellate have a power, if he chuses, though it be determined *male appellatum* to retain the cause above? the appellatant cannot

* VOL. I. E E
See 1 Add 430. The appellate sometimes prays
the cause to be retained 1 Add 137 in note
Sir J. says that by the authority of the Delegates the Ct
is not obliged to retain a cause at petition of both
parties, when it pronounces a judgment. mtr

The cause must be prosecuted within a certain term, i. e. the appeal proceeded on, and this term is two fold, *terminus juris*, and *terminus hominis*; the latter signifying the limit of time within which the judge has bound the party to proceed on pain of his otherwise executing his sentence; the other the boundary assigned by the law in case none be assigned by the judge, which is one year, called *primum fatale*, because under special circumstances a second year may run called *secundum fatale* (65).

The appeal proceeding, an appellatory libel is exhibited, this is contested or answered by the opposite party, the depositions are read from the transcripts in which all the proceedings below are

object (for the reason above) to the *judex appellations*, why should the person appealed be obliged to confess a grievance and pay costs in order to retain the cause above, if he wishes so to do? it appears to me that the case of *Williams v. Lady B. Osborne*, in *Strange's Reports*, proves that he can. The court of appeal there, finding that the appeal which was from a collateral matter after sentence was merely for delay, though they decreed male appellatum, retained the cause above *ad instantum partis appellatæ*, & *Confett*, part 5. Sec. 1. page 242. speaks of the party appellate not confessing the grievance, but having a mind to avoid suit and future charges, and therefore consenting to the judge of the appeal, and agreeing to proceed in the principal business.

(65) See second volume, p. 440, *Admiralty Practice*, note 55.

made up in the form of a book, advocates are heard, and the delegates proceed to pronounce sentence (66), and according to their judgment decree *bene* or *male appellatum*; and in the latter case, approving of the sentence of the judge below send back the whole cause to him with all its incidents, to be by him carried into execution; or they may, if they please, though they remit the cause, retain the taxation and enforce payment of the costs (67).

It remains to be observed, that the proceedings in causes of appeal from grievances are similar (68) to those in appeals from definitive sentence, as to contestation of suit, conclusion, and other judiciary and ordinary acts; and if the principal or original cause be plenary or summary, so will also be the cause of appeal, save only that all the proceedings before the court of delegates are summary.

There is however one remarkable exception to this similarity of proceedings in appeal from *gra-*

(66) In omnibus est petendum & per judicem decernendum, ut in datione libelli in prima instantia. Oughton, tit. 12.

(67) Appeals proceed in like manner from criminal causes, whether of the *mere office*, or *office promoted* by the proctor of the office; or whether *voluntarily promoted* by a person uninterested, or *ex instantia partis* by the party injured.

(68) See Oughton, title 285.

vamina and from definitive sentence, which is that in the former the party is not allowed *non allegata allegare, & non probata probare*.

This rule is the very converse of that followed on appeals to the house of lords (69) and Mr. Justice Blackstone has observed that it is a practice unknown to our law (though constantly followed in the spiritual courts) when a superior court is reviewing the sentence of an inferior, to examine the justice of the former decree by evidence never produced below (70).

This remarkable rule that in appeals from definitive sentence either party may, *non allegata allegare, & non probata probare*, is found in (71) the Code, lib. 7. tit. 63. 4. and in the Clementines, lib. 2, tit. 8. ch. 2: it is in both places restrained; to *new articles, novi articuli ex veteribus pendentes, & ex illis orientes, & ad causum*

(69) See Brown's Cases in Parliament, Vol. I. p. 70.

(70) 3 Blackstone's Commentaries, p. 455. Yet in the case of Rochfort v. Nugent, 1 Brown's Case in Parliament, p. 590. The house of lords seems not to have strictly followed their rule: a common recovery having been there proved in the court below, the party was allowed to produce and prove before the court of appeal a deed to lead the uses, not mentioned below. On a bill of review in chancery, evidence newly discovered, is produced.

(71) See also Gail, lib. 1. Observ. 128. Maranta, pars 6. De Appellat. Baldus in 7m. Codis. Mascardus; Fa-
finacius p. 162. and 596.

pertinentes. On the same article exhibited below to which proof was adduced or their direct contraries, no new evidence can be produced; but on those exhibited below, but not proved, there may: and so to new articles; which may be exhibited, if they are not upon perfectly new matter, arise from the former and spring out of them, and are related to the cause.

The rule of *non allegata allegandi, non probata probandi*, hath also this tack to it, *modo non obstat publicatio testium*. The new allegation or proof therefore must be something which should not be *suggested* or occasioned by the *evidence* already published, though it should *spring* out of the *pleadings* below. Yet what room for controversy is here? Deeds and written instruments are usually admitted, but may not a party have been prompted to forgery as well as perjury, by seeing the strength or weakness of his own or his adversaries cause below. The reader (72) will judge by the examples in the note, how far the civilians have elucidated this rule.

(72) The civilians have thus illustrated this rule by examples, to shew that the *subject* of the suit cannot be changed; they, say qui petit bovem, in appellatione equum petere non potest; in like manner I conceive the ground and foundation of the action could not be changed: he who

*demands a horse, is bound to say
it is a horse, & not a cow, &c.*

✕

CRIMINAL CASES.

The proceedings in these are, as we have seen them to be in the canon law, by *inquisition* or *inquiry*, *accusation*, and *denunciation*. In the first mode, in which the bishop or his official pro-

relied on a written will, could not afterwards rest on a deed, nor on a nuncupative will. But I have known a deed produced *above*, to corroborate a will alleged *below*, by shewing that the testator had always entertained bountiful intentions to the devisee.

Baldus commenting in *cum codicis de appell.* illustrates this rule. Payment, says he, or a release since the decree, is a novum capitulum, quod oritur ex veteribus, and therefore may be allowed on appeal; but if an action were brought for a thing against the vendor, and he pleads that he never sold, he shall not on appeal say that he never was paid and therefore refuses to deliver that thing, for this is a capitulum omnino novum. So a plea of a *pact de non petendo* put in below; defendant shall not be allowed to go on *prescription* above. So objection to the person of the suitor not made below, plea of *bonnitus* cannot be made above.

But if plaintiff below has proved a right of property, he may above prove a right of possession.

Si filius obtinuit in aditione hæreditatis, & in appelle, reus vult probare eum repudiassè, novum est capitulum, ex veteribus non pendens; actor in prima causa non probavit de jure accrescendi, in appellatione potest.

Actor in publiciana non probavit titulum, potest in appellatione, quia Publicianæ conjunctum.

ceeds from the *mere office* (73), induced by public fame or the relation of creditable persons to inquire into the innocence or criminality of persons within his jurisdiction, the party appearing, has articles exhibited to him, which (says Oughton) he is bound to answer upon oath, *not to criminate himself* but so far as relates to the fame and the Judge's jurisdiction; and as if he refuses to appear he may be excommunicated, so if he refuses to answer after being thrice admonished, he is to be pronounced contumacious and the articles taken for confessed, and then Oughton goes on to say that if he does confess the same he is obliged to answer to criminous positions, that is, he is obliged to criminate himself (74). *

(73) But though he may exhibit articles from the mere office, he generally appoints one of the proctors to be the proctor or promoter of office, and appeals in causes of correction consider that proctor as the promovent, and the Judge. This proctor is called a *necessary* promoter, and therefore the proceedings are still *summary*.

(74) How to reconcile these contradictions I confess I do not know, especially as the note refers us to the English statute 13 Ch. II. c. 12. as in the case of Goulson and Wainwright, 1 Sid. 374, it was determined that if articles *ex officio* are exhibited in the spiritual court for matters criminal, the party may plead that he is not bound to answer, and may have a prohibition; but in a mere civil suit he is bound to put in a personal answer. No act similar to the above-mentioned statute of Charles has passed in Ireland; it may be a quere, whether it be not virtually abolished in

K K 4

* *Lord Schenck & Hordy v. H. Adams, &c.*
is decided that Def is not to be tendered an-
touching any thing, whether criminal or not.

If he denies the fame, or admits, it but denies the fact, witnesses are to be examined and proofs produced as in other ordinary causes, and the proceedings in all such causes of correction *ex mero officio* or of the office *necessarily* promoted are *summary*; and if the impugnant doth not appear, the witnesses being examined and their sayings published, definitive sentence may be passed in his absence, he having first been cited *de novo* to hear such sentence. If the impugnant appears he may except against the adversaries witnesses, and reprobate their sayings, and before publication propose any defensive matter in his favour.

The witnesses must shew the grounds of suspicion, and with whom and upon what foundation the fame rested, which if it appears to have arisen from folly or malignity, it is frivolous and false rumour and not public fame; and the impugnant, says Oughton, is not bound to answer such criminous positions, nor to accuse himself of them. If the crime be proved, the judge proceeds to conclusion as in other *summary* causes,

Ireland, but at the last visitation in the college of Dublin, it was asserted that it remained in full force. If so, surely some law ought to be introduced to abolish it, and put us on footing with our sister kingdom.

The act of 6 Geo. I. in Ireland, ch. 6. ordains that no citation *ex mero officio* shall issue unless the crime is charged to have been committed within two years before. This act speaks of the oath of purgation as still in force.

and passes a definitive sentence according to the nature of the crime, with costs against the criminal person ; and though it be not proved, if vehement presumptions and circumstances of great suspicion offer themselves, canonical purgation, says Oughton, may be required from the party, in which if he fails, public penance may be imposed on him, and in some cases he may be excommunicated.

Accusations or suits from the *office voluntarily promoted* are *plenary* ; they admit of replications, duplications, &c. but the accuser is liable to ample costs if he accuses without reason (75).

Denunciations or *presentments* by church-wardens and sidersmen are so entirely out of use, from the danger to which such presenters were liable from the just actions that might be brought against them, and in Ireland by the special provisions of the act 6 Geo. I. chap. 6. that they need here only be mentioned.

This act provides that *voluntary promoters* and *presenters* of offences shall be examined on oath before the citation issues, and the examination reduced to writing, and the promoter failing in proof, condemned in double costs, but this not

(75) It appears to me, that the spirit of the civil law was exactly similar to ours as to criminal pleadings, that after all exceptions were over-ruled, the *litis contestatio*, or pleading the *general issue*, was still open to the prisoner.

to hinder ordinary from proceeding against ecclesiastical persons subject to their visitation in the usual way.

Under this last exception it has been said, that a clergyman at least is not exempted in Ireland from the oath *ex officio*. But without deciding the general question whether he is not, he surely is not liable to it by that act, which says only that nothing therein shall prevent ordinaries from proceeding against ecclesiastical persons, as if that act had never been made, in the like manner as they might or could do before, but it doth not follow that they could before that act and since the reign of Charles II. demand from them the oath *ex officio*.

It is proper here also to repeat what seems not to be universally understood, that though the canons do not *proprio vigore* bind the laity, yet as far as they recite the ancient constitutions of the church incorporated in the common law of the land, they do bind them; for the canon law as far as anciently received and allowed in these kingdoms binds every man (76).

The high commission court, though reprobated by the Irish parliament in 1640, and declared null, never was declared so by any express

(76) This follows from 28 Hen. VIII. ch. 23. and is the determination in Crofs and Middleton, 3 Atkins, in England, 25 Hen. VIII.

act of parliament in Ireland, as it was in England by the act 16 Char. I. (77).

The power of royal visitations, their propriety, and the perfect distinction between them and the ancient high commission court has been elsewhere explained (78).

Whoever wishes to search more deeply into the practice of the ecclesiastical criminal court, will after reading what is said by Oughton upon the subject, study the *Praxis Criminalis* of Farinacius,

(77) Another instance of inattention to real liberty in that country too noted for licentiousness. A commission issued in 1693, commonly called the Lisbon commission to three bishops to visit the diocese of Down, whose bishop (Hacket) and clergy were accused of enormities.

The name of this archdeacon was Matthew, who has published a long argument upon it. He appealed, or applied to the chancellor (*Cox*) for a commission of delegates, insisting that this was not like the high commission court; that it was an ecclesiastical commission, founded on the king's prerogative, and the common law, and such a one as might exist in England, notwithstanding stat. 16 Car. I. and that an appeal lay from it, though none did from the high commission court. That it was the king's visitation operating upon a diocese, like the archbishop's inhibition in his triennial visitation, suspending the bishop's authority for the time being, but substituting another *ordinary* authority in its place. That the bishop's power of visitation is only that emanation of the king's prerogative which may be granted to any body else. How else could an archbishop be deprived?

(78) In a work on Ecclesiastical Law.

and of Damhouder, and the clear disquisitions on the subject in the *Speculum Durandi*. I shall conclude with the sober, charitable, and moderate advice of Oughton to the promoters of criminal suits, which however painful, are too often necessary. Let them examine well, whether their charges are grounded on good evidence or vehement presumptions, and whether public fame however general and prevalent even among good and grave men originate in truth or in private malice and idle rumour, least otherwise they subject themselves to suits both in the temporal and spiritual courts, and to the distressing reflection of having injured the innocent.

These cautions are now less requisite since the statutes have curbed these prosecutions, and added to the moderation of the times, confined within proper and salutary limits.

APPENDIX.

This act on protest being an act of petition
 can not be supported by ^{compulsory} ~~persons~~ oaths
 but only by affidavit, which is voluntary,
 - therefore is resorted to only in certain
 cases. Or sometimes said that a declaration
 in his act of Court, an expression of sympathy
 with the declared apud acte. vide p 460.

Parties are said to enter into & write to an act
 which is then said to be sped & concluded.
 vide 1 Addams 7. It is written to & replied to by the friends
 on each side in the same paper documents. These also
 are signed.
 A Decree to see proceedings is not compulsory,
 merely an invitation with intimation
 that otherwise it will be proceeded in party's
 absence. 1 Addams 20.

APPENDIX.

FURTHER CASES ILLUSTRATIVE OF THE PRECEDING WORK.

MANUMISSION.

Keane *v.* Boycott, A. D. 1795.

2 Hen. Blackstone's Rep. 511.

QUESTION started in this case, whether a master in the West Indies entering into a contract with a slave does not manumit him? the affirmative favoured by L. Ch. J. Eyre, condemned by the reporter, who insists that a slave cannot be manumitted by implication*.

MARRIAGE.

Ilderton & Ilderton, A. D. 1793.

2 H. Bl. 145.

A marriage in Scotland between persons who do not go thither for the purpose of evading the laws of England, will entitle the woman to a dower in England.

DONATIO MORTIS CAUSA.

Hill *v.* Chapman.

2 Brown, 612.

Gift of bank notes in a paper, accompanied with declarations, though not in *extremis*, a good donatio mortis causa.

* The author did hope that, before the publication of this second edition, the noble and pious efforts of Mr. Wilberforce in the senate, and Mr. Gisborne in the closet, aided by the wishes of all good men, would have put an end to the horrid crimes of the slave trade. Alas! he has lived to see it acquire fresh vigour, and triumphant pretences to justification both in England and France.

N. B. this contradicts the matter of the rolls, Millar and Millar, 3 P. Wms.

COLLEGES*.

Bently v. Bishop of Ely.

2 Strange, 913.

Court said it was a question they would not determine, whether when the crown has given statutes and appointed a visitor, the successor can any way alter or annul the former statutes: the practice indeed has been otherwise, but it has never been determined to be good.

Attorney General v. Stephens.

1 Atkyns, 360.

Question made in chancery whether fellow of a college has a right to let his chambers; court refused to determine, and said it ought rather to be determined by the visitor; the question was on Dr. Radcliffe's fellowships: said they supposed he had not left his fellows under greater restrictions than those of other colleges are liable to.

Ex parte Wrangham, A. D. 1795.

2 Vesey, Jun. 609.

Petition by Wrangham to the Lord Chancellor, as visitor of Trinity-Hall, Cambridge, (there being no heir of the founder) to declare the election of a fellow void, and to order the petitioner to be admitted, the court of king's bench having in a similar case declined jurisdiction; the statutes run thus: "*Quod in loco socii subrogetur scholaris idoneus moribus & ingenio qui per tres annos continuos ad minus jura canonica aut civilia audivit in universitate aliqua approbata.*" with some exceptions not here material.

Petitioner insisted that he answered this description, and yet a member of another college was elected. The electors defence was in general terms, that Wrangham

* See Prynne's work on the 4th Inst. is a repository of knowledge relative to colleges.

was not in their opinion a fit and proper person to be elected into the vacant fellowship. Lord chancellor decided against the petition; he was of opinion that the word *mores* has not only the more restrained sense of *morals*, but also the more extended one of *manners*, and that a *dissimilitudo morum*, jarring tempers, discordant dispositions might mar the purposes of such institutions; and that of the disposition, as well as learning and manners, the society were to judge, not arbitrarily or whimsically, but by sound discretion, and upon due consideration of the statutes.

Quere, Though I do not mean in the least to dispute the authority of the determination of that high court in the above instance, to what dangerous latitude might it lead if ill understood: I should wish therefore that every academic would read the case at large, and not trust to any abridgement of it.

Wyme v. Bampton.

3 Atkyns, 473.

The dean and canons of Sarum on renewing leases were accustomed to take fines, and if any of the canonrys were vacant, to divide them among the existing members. A canon, who came in after a lease renewed during a vacancy, sued for his share in chancery, and recovered.

PROTEST OF CERTAIN LORDS

AGAINST COMMITTING THE PROTESTANT DISSENTERS BILL, MAY 3, 1782.

Referred to in the Chapters on Marriage above.

Hodie secunda vice lecta est billa, entitled, an Act for the Relief of Protestant Dissenters, in certain matters therein contained,

It was resolved in the affirmative, that the said bill be committed.

Dissentient,

First, Because it is apprehended that this bill professing to allow protestant dissenting teachers to celebrate marriages between protestant dissenters, may encourage almost every species of clandestine and improvident marriages, not only between protestant dissenters of all denominations, but between protestants and the established church: for it is apprehended, that neither by this bill, nor by any other law now in being, can it be ascertained whether the parties be or be not protestant dissenters, so that any man and woman who may have gone once or twice to a meeting-house, or to hear a field preacher, and calling themselves protestant dissenters, may be married under the sanction of this bill by a protestant dissenting teacher, whether he be a presbyterian teacher, an independent teacher, an anabaptist teacher, a moravian teacher, or any other protestant dissenting teacher whatsoever. Nay, it is apprehended, that a degraded popish priest, a degraded clergyman of the established church, and by the 6th George I. chap. 5. sec. 8. any man whatsoever pretending to holy orders, and taking the oaths and subscribing the declaration therein prescribed, has under this bill a right to solemnize marriages; and therefore the lowest and most profligate men in the state may instantly qualify themselves for that purpose.

Secondly, Because it is apprehended that such marriage may not only be celebrated by all such persons, but that as this bill makes marriages so celebrated good and valid to all intents and purposes whatsoever, those marriages are so far privileged, that there can be no divorce a *vinculo*, for pre-contract, consanguinity, or impotence; for this bill gives to such marriages all the right and benefits of those celebrated by the clergy of the established church, but does not subject them to the same objection.

Thirdly, Because it is apprehended that under this bill marriages may be celebrated by all protestant dissenting teachers with absolute impunity to themselves, between

parties within the prohibited degrees of kindred, without publication of banns, without licence, in a private place at any hour of the night, without witnesses, without registering such marriages, between minors, and without the consent of parents, guardians, or of the lord chancellor, though such transgressions would subject a clergyman of the established church to deprivation if beneficed, and to degradation, if not beneficed, and in the case of a popish priest would be felony without benefit of clergy, and by making such marriages heretofore had good and valid, legal heirs may be robbed of their inheritance by this *ex post facto* law.

Fourthly, Because this bill makes valid to all intents and purposes whatsoever, all matrimonial contracts heretofore entered into between protestant dissenters, and solemnized by protestant dissenting teachers, whether such matrimonial contracts were consummated or not, from whence it is apprehended, that such contracts, not consummated, will, by this *ex post facto* law, be of force to make void subsequent marriages consummated, and to subject women who are now lawful wives to be divorced, and their children to be bastardized, although by the 33d Henry VIII. chap. 6. and the 12th Geo. I. chap. 3. no contract of marriage, celebrated even by a clergyman of the established church but not consummated, shall make void a subsequent marriage which was consummated.

Fifthly, Because this bill, by vesting generally in protestant dissenting teachers without distinction an unregulated power of celebrating marriages, exposes dissenters themselves and their children to all the evil consequences attendant upon clandestine and improvident marriages equally with members of the established church.

And of the numberless sects of protestant dissenters no one denomination of them is guarded by this bill against clandestine and improvident marriages to be celebrated between persons of their persuasion by dissenting teachers of any other denomination whatsoever.

Sixthly, Because it was admitted in debate, that this bill is extremely defective; yet it was argued that it ought to be passed, because it may be hereafter amended, an argument which it is conceived would rather justify the rejection of a bad bill, to which this branch of the legislature is fully competent, than support the passing of such a bill, with a view to a future amendment of it, which cannot be obtained but by the concurrent agreement of all branches of the legislature; for this argument would justify the commission of an actual evil, which might be avoided, in order to apply a future remedy that possibly might never be obtained.

Seventhly, Because those who opposed this bill did repeatedly declare themselves willing to vote for another bill, rendering all matrimonial contracts of marriages heretofore entered into between protestant dissenters, and celebrated by protestant dissenting ministers or teachers, as good and valid to all intents and purposes, as such contracts of marriages would have been if celebrated by the clergy of the established church; and also rendering all matrimonial contracts or marriages hereafter to be entered into between protestant dissenters, and celebrated by protestant dissenting ministers or teachers, of their respective own congregations, under proper regulations, as good and valid to all intents and purposes, as such contracts or marriages would be, if celebrated by the clergy of the established church.

Richard, Armagh,
Belmore,
Shannon,
Traáton,
R. Dublin,
Henry, Meath,
William, Waterford,
Clanwilliam,
Milltown,
Isaac, Cork and Rosé,
Walter, Clonsfert,

Charles, Cashel,
Bellamont,
Enniskillen,
James, Raphoe,
Carlow,
James, Downe and Connor,
Antrim,
Richard, Cloyne,
J. D. Leighlin and Ferns,
Charles, Kildare,
Charles, Elphin.

*Act referred to in Chapter 6th, Book 1.**Anno regni tricesimo quinto*

Georgii III. Regis Chap. 23*.

An act to explain and amend an act passed in the tenth and eleventh years of the reign of King Charles the First, entitled, an act for preservation of the inheritance, rights, and profits of lands belonging to the church, and persons ecclesiastical.

Whereas doubts have arisen as to the validity of leases made under the powers given by an act passed in the tenth and eleventh years of the reign of King Charles the First, entitled, an act for preservation of the inheritance, rights, and profits of lands belonging to the church, and persons ecclesiastical; be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same, that it shall and may be lawful to and for archbishops, bishops, deans, deans and chapters, archdeacons, prebendaries, and other dignitaries ecclesiastical, parsons, vicars, and likewise masters or governors and fellows of colleges, and masters and guardians of hospitals, from time to time to accept of a surrender or surrenders of any lease or leases of any lands or hereditaments, and thereupon to demise such lands or other hereditaments belonging to their respective sees, churches, colleges and hospitals, (the dwelling houses used for any their respective habitations, and demesne lands thereunto belonging, and therewith used and occupied as the demesnes of their said houses only excepted,) unto the person or persons, in such manner and form as by the said act, or any other act or acts now in force they are enabled so to

* This remarkable act, which changed a law considered as sacred for two centuries, but in which change of times may have required mutation, is here introduced to elucidate the notes to Chap. 6. part 1.

do, notwithstanding that upon such lease and leases there shall not be reserved and continued due and payable unto the lessors, and their successors, during the term of twenty, one years, so much yearly rent or profits, or more, as the moiety of the true value of the lands or other hereditaments, *communibus annis*, at, or immediately before the time of making such leases shall amount to.

2. And be it further enacted, that all leases heretofore made by any of the persons aforesaid, of any lands or other hereditaments belonging to their respective sees, churches, colleges, and hospitals, except as before excepted, unto any person or persons, in such manner and form, as by the said act, or any other act now in force, they are enabled so to do, shall be valid and good, notwithstanding there was another lease, or estate, then in being, which did not expire, nor was ended and determined within the time in said recited act mentioned, and also notwithstanding that upon such lease and leases, there were not reserved and continued due and payable unto the lessors during the term of twenty-one years, so much yearly rent or profits, or more, as the moiety of the true value of the lands, or other hereditaments, *communibus annis*, at, or immediately before the time of making such leases did amount unto; provided that the yearly rent or profits which have been, or shall be reserved upon every such lease heretofore made, or hereafter to be made, shall not be less than the yearly rent or profits paid, and payable thereout for the last twenty years preceding the making of such lease, whether such lands or hereditaments, be augmentation lands or others.

3. And whereas, in many instances, lands and hereditaments belonging to archbishops, bishops, deans, deans and chapters, archdeacons, prebendaries and other dignitaries ecclesiastical, parsons, vicars, and likewise masters or governors and fellows of colleges, and masters and guardians of hospitals, in right of their respective sees, churches, colleges and hospitals, upon surrender of the lease or leases

then in being thereof, have heretofore been, and may hereafter be demised by one lease only, and have been; or may be afterwards, separated and demised by two or more distinct leases, with separate and distinct rents reserved thereon respectively; be it enacted, that in all such cases, whether such lands and hereditaments are augmentation lands or others, or both, that each and every of such separate leases shall be as good and valid in law, as the said original one lease would have been.

4. Provided always, that the several yearly rents reserved, or to be reserved on such separate leases, do amount together to a yearly rent and profits, not less than the yearly rent and profits reserved and payable by such one original lease, any law, usage, or custom to the contrary notwithstanding; provided that nothing herein contained shall be construed to authorize any of the persons or bodies corporate aforesaid, to make any concurrent lease, other than what they could respectively have made before the passing of this act.

END OF THE ACT OF PARLIAMENT.

MEMORANDUM.

The two following extracts from Irish acts of parliament, have been inserted, from my observation how much at a loss gentlemen, particularly in England, have been, to know how our law was affected by the tenantry bill, and what acts passed in England are now of force in Ireland, since the statutes recognizing the independence of Ireland in 1782; *they are not totally irrelative to the subject, the first being compared with the emphyteusis of the civil law, the latter necessary from the continued comparison carried on in the notes between the civil and our law.*

“ The stat. 19 and 20. Geo. III. ch. 3. enacts, that
“ courts of equity upon adequate compensation shall re-
“ lieve tenants and their assigns against lapse of time, if
“ no fraud proved, unless it appear, that the fines were
“ demanded, and refused or neglected to be paid within a
“ reasonable time. Provided, that if the landlord has
“ any difficulty in discovering the tenant, in order to make
“ the demand, then demand on the land, with notice in
“ the Dublin and London Gazettes, shall be sufficient.

“ The stat. 21 and 22. Geo. III. ch. 48. enacts, that
“ all statutes heretofore made in England or Great Britain,
“ for the settling and assuming the forfeited estates in the
“ kingdom of Ireland, and also all private statutes made in
“ England or Great Britain, under which any lands, tene-
“ ments, or hereditaments in Ireland, or any estate or
“ interest therein, are or is, holden or claimed, or which
“ any way concern the title thereto, or any evidence re-
“ specting the same; and also all such clauses and provi-
“ sions contained in any statutes made in England or Great
“ Britain, concerning commerce, as import to impose equal
“ restraints on the subjects of England and Ireland as of Great
“ Britain and Ireland, and to entitle them to equal benefits;
“ and also all such clauses and provisions contained in any
“ statutes made as aforesaid, as equally concern the seamen
“ of England and Ireland, or of Great Britain and Ireland,
“ save so far as the same have been altered or repealed,
“ shall be accepted, used or executed in Ireland, according
“ to the present tenor thereof, respectively. Provided,
“ that all such statutes so far as aforesaid, concerning com-
“ merce, shall bind the subjects of Ireland, only so long
“ as they continue to bind the subjects of Great Britain.

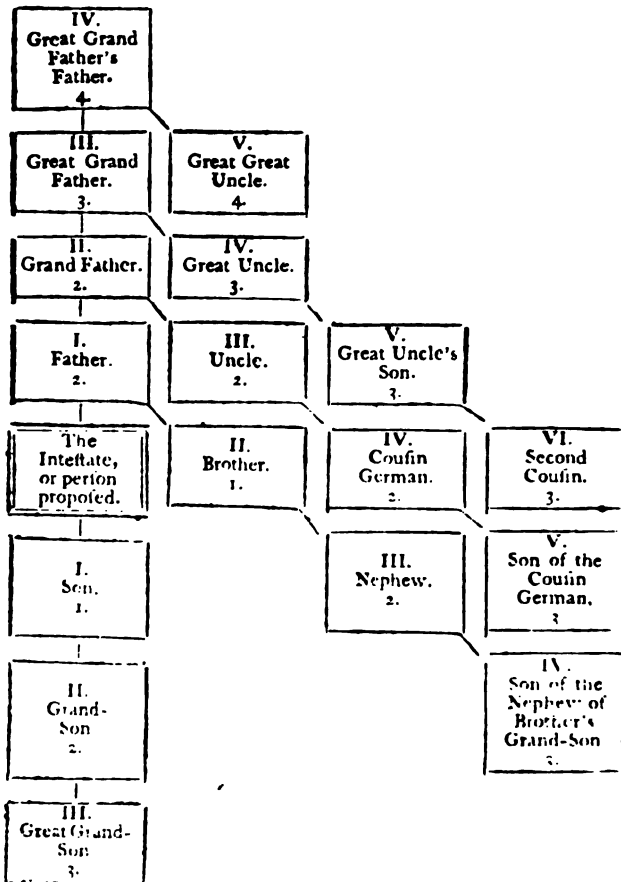
“ And it further enacts, that all such statutes made
“ in England or Great Britain, as concern the stile or
“ calendar; and also all such clauses and provisions con-
“ tained in any statutes made as aforesaid, as relate to the
“ taking any oath or oaths, or making or subscribing any

“ declaration or affirmation in this kingdom, or any penalty
“ or disability for omitting the same, or relate to the con-
“ tinuance of any office, civil or military, or of any com-
“ mission, or of any writ, process or proceeding at law,
“ or in equity, or in any court or delegacy or review, in
“ case of a demise of the crown, shall be accepted, used,
“ and executed in Ireland, according to the present tenor
“ of the same, respectively.”

It cannot be denied, that these general words leave room for many doubts, and it still is often puzzling to determine what is the statute law of Ireland; to give a remarkable instance, perhaps, it would not be easy to say at this moment, whether the oath *ex officio* was or was not ever regularly and expressly (however it may have been virtually) abolished in Ireland.

TABLE OF CONSANGUINITY.

The numeral Roman letters at the top expressing the degrees by the civil law, and the figures at the bottom those by the canon law.



Order of Administration.

1. Widow.
2. Child.
3. Father.
4. Mother.
5. Brother or Sister.
6. Grandfather or Grandmother.
7. Uncle, Aunt, Nephew or Niece.
8. Cousin German.
9. Cousin German once removed.
10. Second Cousin.

The widow is here put first, because usually preferred, but administration *may* be granted to the *next* of kin, to be computed in the order of the subsequent numbers *to*, or jointly with her.

Order of Distribution.

Widow $\frac{1}{3}$ Children or their Representatives the rest equally. B

If no Children, Widow $\frac{1}{2}$, next of kin or their representatives $\frac{1}{2}$.

If no Widow, Children take all.

If neither Widow nor Children, next of kin in the following order.

1. Father.
2. Mother and Brothers and Sisters and their representatives. 122

3. If both Parents dead, Brothers and Sisters or the survivors of them, with the Children of a Brother or Sister deceased.

4. If no Brother or Sister alive, Grandfather or Grandmother, or on failure of them, Uncles and Aunts, Nephews and Nieces of the intestate, in equal portions*.

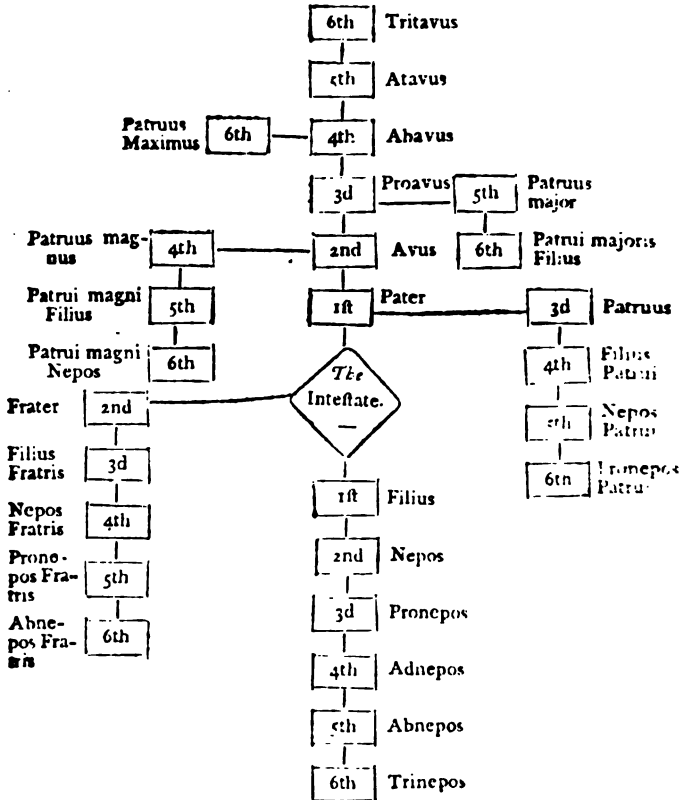
5. For want of all these the next of kin, according to the computation of the civil law, except with this difference, that a nearer collateral excludes a more remote lineal.

N. B. No representation among collaterals beyond Brothers and Sisters children, meaning always Brothers and Sisters of intestate.

* By this rule, if no brother or sister alive, the grand parents come in before nephews and nieces, although the latter would share with a mother, which is the extraordinary consequence of the statute James II. in England, letting them in with the mother, but leaving the preference of the ascending line (where no representation) in all other cases according to the statute of Charles II. Both these statutes are blended together in Ireland, in that of William III. chap. 6.

DEGREES OF CONSANGUINITY

ACCORDING TO THE
CIVILIANS.



Add to this, that the descending line is preferred in infinitum, and the certificate of the civilians in the case of

Carter against Crawley, viz. "Representatio in filiis
" fratrum & sororum tantum locum habet, ad ultiores
" vero collaterales non extenditur et vocantur ad succe-
" sionem reliqui collaterales quicunque in gradu sunt
" proximiores remotioribus exclusis ita quod infalabiliter
" semper prior in gradu sit potior in successione." And
the civil law, as it relates to distribution, will be very
clear.

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